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United States
Circuit Court of Appeals
For the Ninth Circuit.

CALEDONIAN INSURANCE COMPANY, ROCHES-
TER GERMAN INSURANCE COMPANY,
CALEDONIAN-AMERICAN INSURANCE
COMPANY and THE SCOTTISH UNDER-
WRITERS,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

AUG 25 1915

F. D. Monckton,

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Demurrer	23
Amendment to Complaint.....	52
Answer and Cross-complaint of Defendants....	25
Answer to Cross-complaint.....	44
Assignment of Errors.....	94
Bill of Exceptions, Defendants'.....	66
Bill of Items Annexed to Mandate Pursuant to Section 5, Rule 31.....	60
Bond	99
Certificate of Clerk U. S. District Court to Judgment-roll	56
Certificate of Clerk U. S. District Court to Judgment-roll	65
Certificate of Clerk U. S. District Court to Transcript of Record.....	101
Citation on Writ of Error (Original).....	105
Clerk's Certificate to Judgment-roll.....	56
Clerk's Certificate to Judgment-roll.....	65
Complaint	1
Cross-complaint of Defendants, Answer and...	25
Demurrer	21
Demurrer, Amended	23
Exceptions, Defendants' Bill of	66

Index.

Page

EXHIBITS:

Defendants' Exhibit No. 1—Letter, April 27, 1907, Goodfellow & Eells to Thomas J. Conroy et al.....	77
Defendants' Exhibit No. 2—Letter, June 22, 1906, S. W. Levy to Caledonian Insurance Co. et al.....	79
Judgment Filed and Entered September 25, 1914.....	63
Judgment Filed and Entered October 5, 1911...	54
Mandate of U. S. Circuit Court of Appeals....	57
Opinion, Oral.....	85
Order Allowing Plaintiff to File Amendment to Complaint.....	52
Order Amending Answer.....	51
Order Extending Time to File Record on Writ of Error and to Docket the Case.....	107
Order for Issuance of Writ of Error.....	98
Order for Judgment.....	63
Order Overruling Demurrer to Complaint and Denying Motion to Strike Out.....	25
Order Settling and Allowing Bill of Exceptions.	91
Order Spreading Mandate on Minutes.....	57
Petition for Writ of Error.....	92
Proceedings Had December 11, 1913.....	66
Stipulation for Allowance of Bill of Exceptions.	90
Stipulation Waiving Jury.....	62
Summons.....	18

Index.

Page

TESTIMONY ON BEHALF OF PLAINTIFF:

CONROY, THOMAS J..... 80

WREN, D. J..... 68

Cross-examination 72

Redirect Examination..... 75

Recross-examination..... 75

TESTIMONY ON BEHALF OF DEFEND-
ANTS:

CONROY, THOMAS J..... 76

LEVY, S. W..... 79

Verdict..... 53

Writ of Error (Original)..... 102

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY,
ROCHESTER GERMAN INSURANCE
COMPANY, CALEDONIAN-AMERICAN
INSURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Complaint.

Plaintiff complains of defendants above named,
and for cause of action alleges:

I.

That the plaintiff is, and at all times hereinafter mentioned was, a citizen of the United States and of the State of California, and a resident of the City and County of San Francisco, within the Northern District of said State.

II.

That each of the defendants, Caledonian Insurance Company and The Scottish Underwriters is, and at all said times, was, a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland; and each of the defendants, Rochester German Insurance Company and Caledonian-American Insurance Company, is, and at all said times was, a corporation organized and existing under the laws of the State of New York.

III.

That on the 31st day of March, A. D. 1906, and for several years prior thereto, said four corporations defendant were carrying on the business of fire insurance in said City and County of San Francisco, and were for the purposes of said business [1*] occupying a common office in the building No. 323 California Street in San Francisco, and one Thomas J. Conroy was then and there the manager of the business so carried on in San Francisco by each of said corporations defendant, and was by them duly empowered and authorized to contract for them as he is herein averred to have done.

IV.

That on the 31st day of March, A. D. 1906, at the City and County of San Francisco aforesaid, the said Conroy, as manager of said four corporations defendant and for their act and deed, intending thereby to obligate and bind said defendants jointly and severally, did sign, execute and deliver to this plaintiff in duplicate, a certain written agreement in words and figures following, that is to say:

“San Francisco, March 31, 1906.

“Mr. S. W. Levy,

“City.

“Dear Sir:

“Referring to our verbal understanding of recent date, have now to confirm same as follows:

“For and in consideration of the sum of One Thousand Dollars (\$1,000) payable to you monthly, you agree to place in the companies represented in

*Page-number appearing at foot of page of original certified Record.

this office, or through them, any and all Fire Insurance business which you may be able to secure or control.

“That all of the business so secured or controlled by you shall be placed where it will result to the greatest benefit to the companies represented in this office, save and except that none of it shall be placed with Messrs. Ahpel & Bruckman, [2] either direct or by reinsurance;

“That you shall employ Melville S. Levy, whose services during usual business hours shall be given the companies represented in this office when not otherwise engaged on your business;

“That the consideration above expressed shall cover any and all compensation for services rendered by yourself and clerical service of your employees, to the companies represented in this office, and its management;

“If, at any time during the existence of this agreement, rates of fire insurance should be suspended in San Francisco, the terms of this agreement shall cease immediately, and in lieu thereof shall a commission of thirty-five per cent on net premiums be paid you, to date of its expiration.

“This agreement to commence April 1st, 1906, and to continue for a period of two years thereafter.

“Yours very truly,
“THOS. J. CONROY,
“Manager.”

V.

That thereupon, at the same time and place, this plaintiff wrote upon one of the said duplicates of said

agreement immediately following the said signature of said manager thereto, the words "approved, S. W. Levy," and redelivered to said Conroy, as such manager, the said duplicate so signed and approved by the plaintiff.

VI.

That the words in said agreement, "the Companies represented in this office," were intended and understood by said Conroy and this plaintiff at the said time of executing said agreement to mean the said four corporations defendant, and their said office at No. 323 California Street. [3]

VII.

And plaintiff alleges that at all times after the making of said agreement, and until and including the month of April, A. D. 1907, the plaintiff duly performed on his part, all the conditions of the said agreement, and placed in the defendant companies, or through them, any and all fire insurance business which he was able to secure or control. That the rates of fire insurance were not suspended in San Francisco at any time during the existence of the said agreement, or the two years' term thereof.

VIII.

In the month of April, A. D. 1906, a great earthquake and fire occurred in the City and County of San Francisco, whereby a large portion of the said city and the buildings and property therein was destroyed. Thereafter, in the month of June, A. D. 1906, the defendants claimed and asserted to the plaintiff that by reason of said destruction of property caused by said earthquake and fire, it would not

be possible for the plaintiff to secure for the defendants the business, in consideration of which the said agreement was made. That by reason of said destruction of property, the consideration for the said agreement had failed in a material respect, and the defendants then asserted and notified the plaintiff that they would no longer recognize the said agreement as binding upon them; but that they did then and there rescind the same, and at all times thereafter until the decision of the Supreme Court of the State of California, hereinafter referred to, the defendants persisted in claiming and asserting that the said agreement was no longer in force or effect, and that they would not perform, on their part, any of the obligations thereof and wholly repudiated the said agreement, and refused to be bound thereby, and failed to perform the same in whole, [4] or in part.

IX.

That the plaintiff, notwithstanding such repudiation, continued to render his services as hereinbefore alleged, and on the 17th day of September, A. D. 1906, commenced an action against the said defendants in the Superior Court of the State of California, in and for the City and County of San Francisco, wherein the plaintiff alleged the execution of the said contract, as hereinbefore alleged, and set forth a copy thereof, and alleged performance thereof on his part from the making of the same until and including the month of August A. D. 1906, and prayed judgment against the defendants for the sum of one thousand dollars per month for each of

the months of April, May, June, July and August, in the said year 1906.

The defendants filed their answer to the plaintiff's complaint in said action, wherein they alleged under oath that at the time of the making of the said agreement, the principal portion of the business controlled by the plaintiff consisted of risks in what was known as the business district of the City and County of San Francisco; that such business district was destroyed by the said earthquake and fire in the month of April, A. D. 1906, and that by reason thereof and the destruction of insurable property in said burnt district, it would not be possible for plaintiff to secure for the defendants the business, in consideration of the securing and procurement of which the defendants made the said agreement. And in said answer defendants further alleged that by reason of said destruction of said business portion of said city, the consideration for said agreement had failed in a material respect, in that the plaintiff would not be able to secure for defendants over twenty per cent of the business which otherwise would have been secured for the defendants. And in said answer, the defendants further alleged that immediately following said [5] destruction of said business district, they did notify the plaintiff that they would no longer recognize the agreement aforesaid, and sued upon in the said action, as binding upon them, or any of them, and did then and there rescind said agreement and did notify plaintiff that they did rescind the same.

X.

During the pendency of the said action, the plaintiff filed his supplemental complaint therein based upon the said agreement and the performance thereof by him during the months of September, October, November and December in the year 1906, and the months of January and February in the year 1907, and the defendants made the like defenses to the said supplemental complaint as to the plaintiff's original complaint in said action.

Thereafter, the said action came on to be tried before the said Superior Court, sitting without a jury, and Findings of Fact and Conclusions of Law were filed therein, to wit, on the 22d day of January, A. D. 1908, by the terms of which the Court found all the allegations of the plaintiff's complaint to be true; that the written agreement aforesaid contained all the agreements and understandings of the parties to the said action; that it was not true that by reason of the destruction of the business district in the answer referred to or the destruction of property, that it would not be possible for the plaintiff to secure the business in consideration of which the defendants entered into said agreement; that the said agreement had not failed in any material respect; that the plaintiff would not be unable to secure for the defendants over twenty per cent of the business, which, but for the said fire, would have secured for the defendants; but that on the contrary, the business of fire insurance at all times since the said earthquake and fire, had been conducted in the City and County of San Francisco, although the location

of the risks had [6] changed by reason of the said fire, and that the plaintiff had been able to procure, and had in fact procured for the defendants, a larger amount of business than before the fire. The Court further found that the defendants did not rescind the said agreement, but that they did, one month after the said earthquake and fire, notify the plaintiff that by reason thereof, the agreement was no longer binding upon them. As Conclusions of Law, the Court found that the plaintiff was entitled to judgment as prayed for in his complaint and supplemental complaint, and ordered judgment accordingly. Thereafter, on the 23d day of January, A. D. 1908, judgment upon the said findings was entered in favor of the plaintiff and against the defendants for the principal sum of twelve thousand and seven and 32/100 (12,007.32) dollars, with interest and costs.

XI.

Thereafter, on the 21st day of March, A. D. 1908, the defendants appealed from the said judgment to the Supreme Court of the State of California, and upon said appeal in briefs filed in the said Supreme Court and in a petition for rehearing after judgment had been rendered therein, claimed and asserted, as claimed by them in their answer in the said Superior Court, that the said agreement was no longer binding upon them and that the same had been rescinded. On the 23d day of November, A. D. 1909, the said judgment of the Superior Court was affirmed by the Supreme Court of the State of California. Thereafter, on or about the 23d day of December, A. D. 1909, the petition of the defendants for rehearing

therein was denied by said Supreme Court, and its judgment became and was final. Whereupon, a remittitur was issued from said Supreme Court to said Superior Court, and on the — day of January, A. D. 1910, the defendants paid the said judgment. [7]

XII.

And plaintiff alleges that another action was commenced by him in the said Superior Court, to wit, in the month of April, A. D. 1907, upon the contract aforesaid, whereby he sought to recover from the defendants the sum of one thousand (1,000) dollars for his services under the said contract rendered during the month of March, A. D. 1907. That in the month of January, A. D. 1910, the defendants paid the amount so prayed for by the plaintiff in the said action last referred to, and the said action was thereupon by him dismissed.

XIV.

That save as to the sums so paid by the defendants in the month of January, A. D. 1910, in satisfaction of the judgment appealed from by them as aforesaid, and in satisfaction of the claim for services rendered during the month of March A. D. 1907, the defendants have not paid to the plaintiff any moneys on account of the said contract or services rendered by the plaintiff under the same, or at all.

XV.

That the plaintiff rendered services under the said agreement to the defendants during the month of April, A. D. 1907, and fulfilled on his part, as hereinbefore alleged, all the terms of the said agreement, but that the defendants have not paid to the plain-

tiff the sum of one thousand (1,000) dollars for services rendered during said month of April, A. D. 1907, and which by the terms of said agreement became payable to the plaintiff on the last day of April, A. D. 1907, nor have the defendants paid to the plaintiff any part thereof, or any interest thereon.

WHEREFORE, in this first count or cause of action, plaintiff prays judgment against defendants for the sum of one thousand (1,000) dollars, together with legal interest thereon from the 30th day of April, A. D. 1907, and for costs of suit. [8]

For a second and separate cause of action, the plaintiff repeats all the preceding allegations of this complaint, and makes the same a part of this second count or cause of action, and further alleges:

XVI.

That on the 27th day of April, 1907, he addressed and delivered to the defendants a letter by which he stated to them, respecting the said contract, that he would continue to render his services under the same until the end of the said month of April, A. D. 1907, at which time he would make demand upon them for his compensation according to the contract; that if they still refused payment, and still persisted in claiming that the said contract had been rescinded, he would consider that they had committed a breach of the contract and would sue them once and for all for damages. In his said letter he stated to the said defendants that he was, and always had been, ready and willing to carry out the contract on his part, and to continue it to the end of the term of two years, and that he hoped the defendants would conclude to

abandon the position which he considered, and was advised to be, utterly untenable, to wit, that the contract had been terminated by the destruction of property in the burnt district.

The defendant, by letter bearing date April 29th, A. D. 1907, replied to the plaintiff in substance as follows, to wit:

We note in your letter the reiteration of your statement so often made to the writer that the position which the companies have taken is utterly untenable, and of course it is not impossible that the courts may ultimately so hold. Until then, however, the defendants will accept the views of their own counsel and will seek the legal determination of the question in dispute. If the Courts shall ultimately determine that the [9] destruction of the principal part of the City of San Francisco, by reason of which destruction the plaintiff's ability to perform the contract between himself and the companies was destroyed, does not release the companies from their obligation under that contract, then the plaintiff will be paid the one thousand (1,000) dollars per month which he is now seeking to recover. If, upon the other hand, it shall be held that such destruction of the city did release the companies, then and in that case the plaintiff will receive the usual brokerage for the business which he has placed with the companies.

XVII.

At all said times, as plaintiff and the defendants well knew, it was impossible to obtain a determination of the questions in dispute between the plaintiff and defendants, as to whether the said contract

remained in force until more than one year after the said contract, by its terms, would have expired. That the plaintiff was ready, willing and anxious to fulfill said contract on his part until the end of the term thereof, but that the defendants, in conformity with their said letter, dated April 29th, A. D. 1907, at all times thereafter persisted in claiming and asserting that the said contract had been rescinded and was no longer in force and effect, and at all times continued to repudiate the same on their part, and refused to be bound thereby, and failed and refused to pay to plaintiff the sum of one thousand (1,000) dollars per month as provided in said contract, or any other sum as in compliance therewith, or at all.

XVIII.

Accordingly, in the month of May, 1907, the plaintiff commenced an action against the said defendants in the said Superior Court, wherein he set forth that defendants had so repudiated [10] the said agreement and wherein the plaintiff sought, as stated in his said letter, to recover from defendants all the damages sustained by him accrued and to accrue until the end of the term of the said contract, to wit, in the sum of twenty-four thousand (24,000) dollars.

The said action continued pending in said Superior Court until the month of August, 1910, at which time, and before the trial thereof, the same was dismissed on motion of the plaintiff without prejudice to the commencement of another action.

XIX.

And the plaintiff, in this second count or court of action, alleges that by such repudiation and breach

of agreement of defendants in the premises, he has sustained damage in being deprived of the benefits of the said agreement and the moneys therein provided to be paid for services to be rendered by him, from and including the month of May, 1907, to and including the month of March, 1908, together with legal interest upon said sums from the time they would have become due, and has sustained damages in the premises in the sum of \$11,000.00.

XX.

For a third and separate cause of action, plaintiff repeats all the paragraphs of this complaint numbered from I to XVII, inclusive, and makes the same a part of this third count or cause of action, and further alleges:

That the plaintiff continued from and after the said month of April, 1907, until and including the month of March, 1908, to carry on at the City and County of San Francisco, the business of an insurance broker, being the same business in which he was engaged by the defendants to render services under the said agreement. That the plaintiff was unable to dispose of his insurance business from and after the month of April, 1907, to greater [11] advantage by placing the same otherwise or elsewhere than with the defendants, and that the plaintiff by placing the same with the defendants was enabled, as far as possible, to reduce the amount of damages to be recovered by him from the defendants by reason of their repudiation and breach of said agreement in the premises; accordingly, notwithstanding such repudiation and breach of agreement

on the part of the defendant, the plaintiff at all times from and after the month of April, 1907, until and including the month of March, 1908, continued to place, and did place in the defendant companies, or through them, any and all fire insurance business which he was able to secure or control, and did duly perform and fulfill on his part all the terms and conditions of the said agreement, save that he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies. Such amounts of brokerage were so deducted by the plaintiff from the premiums collected by him for the defendants as and when such premiums were collected and received by the plaintiff, and such was at all times the custom and practice of insurance brokers.

The plaintiff is ready and willing in this action, to give to the defendants credit for the amounts so deducted and retained by him, as of the first day of the month in which the same were so collected; and the following is a statement of the amounts so collected and retained by the plaintiff and the month in which the same were so collected and retained, to wit:

In the year 1907, in June, \$484.03; in July, \$278.40; in August, \$560; in September, \$361.40; in October, \$362.10; in November, \$191.63; in December, \$315.64; in the year 1908; in January, \$217.95; in February, \$199.05; in March, \$197.18; in April, \$157.80; in May, \$142; in June, \$121.70. [12]

And plaintiff alleges that defendants accepted and

retained the services so rendered by plaintiff from and including the month of May, 1907, to and including the month of March, 1908, and accepted and retained the fire insurance business which, during said months, he so placed in them or through them; but the defendants at all times failed and refused to pay to plaintiff the sum of one thousand (1,000) dollars per month, or any other sum for such services or business, or at all.

In this third count or cause of action, plaintiff prays judgment against defendants in the sum of \$7,411.62, with legal interest upon the sum of one thousand (1,000) dollars for each of the said several months from and including May, 1907, to and including March, 1908, from the end of each of said several months until paid, after crediting to the defendants upon such monthly principal sums the amount so received and retained by the plaintiff as aforesaid.

For a fourth and separate cause of action, the plaintiff repeats all the allegations contained in Paragraphs I to XX of this Complaint, and further alleges:

XXI.

That in course of transacting the business hereinbefore referred to between the plaintiff and defendants, in divers instances, insurance was placed through the defendants; that is to say: the insurance was placed with companies other than the defendants, in the name of the defendants as brokers, and the defendants received the full commission upon such insurance so placed through them. In divers

instances, the policies of insurance so placed in other companies were canceled and surrendered before the expiration of the term thereof, by reason whereof the insured became entitled to a return of a proportional part of the premium and repayment of such proportional [13] part was made by the plaintiff. That the plaintiff collected and received from the companies whose policies had been so canceled, the proportional part of the premium repayable to the insured less a proportional part of the commission which the said companies had paid and which had been received by the defendants herein. That the plaintiff made such repayments to the insured at the instance and request of the defendants herein, and that the said defendants promised and agreed to make good to and pay to plaintiff such proportional part of the commissions received by them, but failed so to do in part, and that a balance is and remains unpaid of such proportional commissions in the sum of \$237.45.

WHEREFORE, in this action plaintiff prays judgment against the defendants in the sum of eight thousand six hundred and forty-nine and 7/100 (8,649.07) dollars, together with interest on \$1,000 from April 30th, 1907, and interest on \$1,000 from May 31st, 1907, and interest on \$484.03 from June 30th 1907, and interest on \$278.40 from July 31st, 1907, and interest on \$560 from August 31st, 1907, and interest on \$361.40 from September 30th, 1907, and interest on \$362.10 from October 31st, 1907, and interest on \$191.63 from November 30th, 1907, and interest on \$315.64 from December 31st, 1907, and in-

terest on \$217.95 from January 31, 1908, and interest on \$199.05 from February 28th, 1908, and interest on \$197.18 from March 31st, 1908, and interest on \$157.80 from April 30th, 1908, and interest on \$142 from May 31st, 1908, and interest on \$121.70 from June 30th, 1908; and for costs of suit.

GOODFELLOW, EELLS & ORRICK,

Attorneys for Plaintiff. [14]

State of California,

City and County of San Francisco,—ss.

S. W. Levy, being duly sworn, deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

S. W. LEVY .

Subscribed and sworn to before me, this 11th day of November, A. D. 1910.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 12, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[15]

Summons.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial
Circuit, Northern District of California.*

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCH-
ESTER GERMAN INSURANCE COM-
PANY, CALEDONIAN-AMERICAN IN-
SURANCE COMPANY, and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Action brought in the said Circuit Court and the
Complaint filed in the office of the Clerk of the
said Circuit Court, in the City and County of
San Francisco.

GOODFELLOW, EELLS & ORRICK.

Attorneys for Plaintiff.

The President of the United States of America,
Greeting: To Caledonian Insurance Company,
Rochester-German Insurance Company, Cale-
donian-American Insurance Company, and The
Scottish Underwriters, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR
and answer the Complaint in an action entitled as
above, brought against you in the Circuit Court of
the United States, Ninth Judicial Circuit, in and for
the Northern District of California, within ten days
after the service on you of this Summons—if served

within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable JOHN M. HARLAN, Senior Associate Justice of the Supreme Court of the United States, this 12th day of November, in the year of our Lord one thousand nine hundred and ten of our independence the 135th.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [16]

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the hereunto annexed Summons on the 12th day of November, 1910, and personally served the same upon the Caledonian Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters by handing to and leaving an attested copy of the annexed Summons together with a copy of the Complaint attached thereto with T. J. Conroy, who is the person designated by each of the above-named defendants under the Statutes of the State of California, as the person upon whom all legal process shall be served in matters affecting each or any of the above-named defendants in the State of Califor-

nia, on the 14th day of November, 1910, in the City and County of San Francisco, in said District.

I further return that I served the annexed Summons upon the Rochester German Insurance Company by handing to and leaving an attested copy of the annexed Summons, together with a copy of the Complaint attached thereto, with Geo. O. Hoadley, who is a member of the firm of Gordon & Hoadley, which said firm of Gordon & Hoadley is designated by the said defendant Rochester German Insurance Company under the Statutes of the State of California, as the person or firm upon whom service of all legal process shall be made in matters affecting the Rochester German Insurance Company in the State of California, on the 14th day of November, 1910, in the City and County of San Francisco in said District.

Dated at San Francisco, California, this 15th day of November, 1910.

C. T. ELLIOTT,
United States Marshal.
By B. F. Towle,
Office Deputy Marshal.

[Endorsed]: Filed Nov. 16, 1910. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [17]

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY,
ROCHESTER-GERMAN INSURANCE
COMPANY, CALEDONIAN-AMERICAN
INSURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Demurrer.

Now, come the defendants above named and demurring to the complaint of plaintiff on file herein, for ground of demurrer allege:

(1) That said complaint does not state facts sufficient to constitute a cause of action.

(2) That said alleged first cause of action does not state facts sufficient to constitute a cause of action.

(3) That said alleged second cause of action does not state facts sufficient to constitute a cause of action.

(4) That said alleged third cause of action does not state facts sufficient to constitute a cause of action.

(5) That said alleged fourth cause of action does not state facts sufficient to constitute a cause of action.

(6) That said complaint is ambiguous in this,

that in the third alleged cause of action, the plaintiff sets forth a credit of \$3588.88, and under the same statement of facts as set forth in the alleged second cause of action, he demands judgment for \$7411.62, which is \$411.62 more than the amount demanded in the alleged second cause of action, where no credits are set forth.

(7) That said complaint is uncertain for the reason set forth in paragraph six.

(8) That said complaint is unintelligible for the reason [18] set forth in paragraph six.

WHEREFORE, defendants pray to be hence dismissed, with their costs.

OTTO IRVING WISE,
T. C. VAN NESS, Jr.,
Attorneys for Defendants.

Receipt of a copy of the within demurrer this 7th day of January, 1911, is hereby admitted.

GOODFELLOW, EELS & ORRICK,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 7, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [19]

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY,
ROCHESTER-GERMAN INSURANCE
COMPANY, CALEDONIAN-AMERICAN
INSURANCE COMPANY, and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Amended Demurrer.

Now come the defendants above named and demurring to the complaint of plaintiff on file herein, for ground of demurrer allege:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said alleged first cause of action does not state facts sufficient to constitute a cause of action.

3. That said alleged second cause of action does not state facts sufficient to constitute a cause of action.

4. That said alleged third cause of action does not state facts sufficient to constitute a cause of action.

5. That said alleged fourth cause of action does not state facts sufficient to constitute a cause of action.

6. That said complaint is ambiguous in this: that in the third alleged cause of action, the plaintiff sets

forth a credit of \$3588.88, and under the same statement of facts as set forth in the alleged second cause of action, he demands judgment for \$7411.62, which is \$411.62 more than the amount demanded in the alleged second cause of action, where no credits are set forth.

7. That said complaint is uncertain for the reason set forth in paragraph six. [20]

8. That said complaint is unintelligible for the reason set forth in paragraph six.

WHEREFORE, defendants pray to be hence dismissed with their costs.

T. C. VAN NESS.

Due service and receipt of a copy of the within amended demurrer is hereby admitted this —— day of January, 1911.

GOODFELLOW, EELLS & ORRICK,

Attorneys for Plff.

[Endorsed]: Filed Jan. 14, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Tuesday, the 16th day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. et al.,

**Order Overruling Demurrer to Complaint and
Denying Motion to Strike Out.**

Defendants' amended demurrer to the complaint and amended motion to strike out parts of the complaint, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion thereon, it was ordered, in accordance therewith, that said demurrer be and the same is hereby overruled and that said motion to strike out be and the same is hereby denied. [22]

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY,
ROCHESTER-GERMAN INSURANCE
COMPANY, CALEDONIAN-AMERICAN
INSURANCE COMPANY, and THE
SCOTTISH UNDERWRITERS,

Defendants.

Answer and Cross-complaint of Defendants.

Defendants for answer to the complaint of plaintiff above named, and answering the first cause of

action in said complaint contained, admit, deny and allege as follows:

1. Defendants deny that plaintiff, until and including the month of April, 1907, duly, or at all, performed all, or any of the conditions of the agreement set forth in Paragraph IV of plaintiff's complaint and, or, under said contract placed in the defendant companies, and, or, through them, any and all, or any or all, fire insurance business which he was able to secure and, or control. And in this connection, defendants allege that on or about the 1st day of April, 1907, the plaintiff refused, and thereafter did continue to refuse during the life of the said contract, to wit, until the first day of April, 1908, to perform all, or any, of the terms or conditions of the said contract on his part to be performed; and that since on or about said 1st day of April, 1907, plaintiff has not been ready or willing to perform, and has not offered to perform, and has not performed, all, or any, of the terms or conditions of the said contract on his part to be performed.

[23]

2. Defendants deny that in the month of June, 1906, or at any other time, or at all, they repudiated the said contract on their part. Defendants deny that at all times since the month of June, 1906, they refused to carry out and, or, perform the said contract on their part, and, or, to pay plaintiff any of the moneys therein provided to be paid, and in this connection, defendants allege that prior to plaintiff's said refusal to further perform the terms and conditions of the said contract on his part to be per-

formed, the defendant's notified plaintiff that if the Court should ultimately determine that by reason of the earthquake which occurred in the City and County of San Francisco in the month of April, 1906, the said contract was not discharged, then defendants would pay to plaintiff the sum of \$1,000 for each month during which plaintiff performed the terms and conditions of the said contract on his part to be performed. Defendants admit that in or about the month of June, 1906, they claimed and asserted that by reason of the earthquake which occurred in the City and County of San Francisco in the month of April, 1906, they were entitled to rescind, and had rescinded, the said contract, and that the said contract was no longer in subsistence between plaintiff and the defendants; but defendants allege, that notwithstanding the said claim and assertion of defendants, plaintiff refused to consider the said contract at an end, and during the period of time beginning April 1st, 1906, and ending on or about April 1st, 1907, the plaintiff did perform all the terms and conditions of the said contract on his part to be performed, and did at the end of each month during said time demand from defendants their performance of the said contract, and that defendants, during all of said time, were willing to accept and receive, and did accept and receive such performance by the plaintiff. Defendants further allege in this behalf that on the first day of April, [24] 1907, and at all times thereafter until the first day of April, 1908, the day upon which the said contract was to cease by its terms, defendants were willing to accept and receive

from said plaintiff performance of the terms and conditions of the said contract on plaintiff's part to be performed.

3. Defendants allege that heretofore, and on or about the 17th day of September, 1906, the plaintiff commenced an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against these defendants, to recover from them the sum of \$11,000 alleged to be due to plaintiff for his performance rendered to defendants, of all of the terms and conditions of the said contract upon his part to be performed during the period of time elapsing between the 31st day of March, 1906, and the first day of March, 1907. That thereafter, and on the 23d day of January, 1908, judgment in said action was duly given and made in favor of said plaintiff and against the said defendants for the said sum of \$11,000, together with interest and costs; that said judgment was duly entered on the said 23d day of January, 1908, in Book 11 of Judgments, at page 78, in the office of the county clerk of the City and County of San Francisco, State of California; that, by the said judgment, it was adjudged that said plaintiff had duly performed all of the terms and conditions of the said contract on his part to be performed from the 31st day of March, 1906, to the 1st day of March, 1907; that said defendants have accepted and received from the said plaintiff his said performance of the said terms and conditions of the said contract on his part to be performed during the said period of time, and that, during all of said period of time, the said

contract was in subsistence between plaintiff and defendants. [25] That the judgment rendered in said action was upon the supplemental complaint referred to in Paragraph X of the complaint herein. That the judgment obtained by the plaintiff in said action in the Superior Court of the State of California, in and for the City and County of San Francisco, was affirmed by the Supreme Court of the State of California, and the said judgment, together with interest and costs, was paid by the defendants to the plaintiff in January, 1910, upon the issuance of a remittitur from the said Supreme Court to the Superior Court. That as to the action commenced by the plaintiff against these defendants in the said Superior Court, and referred to in Paragraph XII of the complaint herein, these defendants allege that it was agreed between them and the plaintiff by and between their respective counsel that said action should abide the judgment in the former action hereinabove referred to, and that in accordance with such agreement, these defendants paid the claim therein in said second action covering the services of this plaintiff for the month of March, 1907, and thereupon the plaintiff dismissed the said action, and said dismissal has been heretofore entered of record in the said Superior Court.

4. These defendants deny that the plaintiff rendered services under the said agreement, or under any agreement, to the defendants during the month of April, 1907, and, or fulfilled on his part all, or any, of the terms of the said agreement, and in this behalf these defendants allege that the plaintiff failed, re-

fused and neglected to render the services required of him to be performed under the terms of his said agreement during the month of April, 1907, and failed, refused and neglected to perform any of them during said month or thereafter up to and including April 1st, 1908, when said contract would be terminated by its term. [26]

5. Further answering the first cause of action of said complaint, and as a separate defense thereto, these defendants allege that from, on, or about the first day of April, 1908, the plaintiff placed with various insurance companies operating in the City and County of San Francisco, State of California, all of the fire insurance business which said plaintiff was able to secure or control during that period of time; that for said business so furnished by plaintiff, plaintiff received as commissions, the sum of \$3365.21, and that plaintiff has retained, and now retains, the whole of said sum to his own use and benefit.

6. Further answering the said first cause of action, and as a separate defense thereto, these defendants allege that they are informed and believe, and upon such information and belief they allege, that if plaintiff had performed the terms and conditions of the said contract on his part to be performed during the period of time commencing on or about the first day of April, 1907, and ending on the 31st day of March, 1908, said plaintiff would have had to expend, in order to have so performed, the sum of \$650.00 per month for the said period of time; that by reason of plaintiff's said nonperformance of the

terms and conditions of the said contract upon his part to be performed during the said period of time, plaintiff was not required to expend, and did not expend, the said sum of \$650.00 per month for the said period of time, or any other sum, in order to perform the terms and conditions of the said contract on his part to be performed.

As and for their answer to the second cause of action set forth in the complaint above-mentioned, these defendants repeat all the preceding allegations of this answer and make [27] the same a part of their answer to the second cause of action in that complaint, and further admit, deny and allege as follows:

7. These defendants deny the allegations contained in Paragraph XVII of the complaint that at the times mentioned in said second cause of action of said complaint these defendants knew that it was impossible to obtain a determination of the questions in dispute between the plaintiff and the defendants until more than one year after the said contract, by its terms, would have expired. These defendants deny that the plaintiff was ready and, or, willing, and, or, anxious to fulfill said contract on his part until the end of the term thereof, and these defendants deny that in conformity with this letter dated April 29th, 1907, which said letter is set forth in the complaint, or otherwise, or at all, or at all or any time thereafter, they persisted in claiming and, or, asserting that the said contract had been rescinded and, or, was no longer in force and effect, and, or, at all times continued to repudiate the same on their

part, and, or, refused to be bound thereby, but they allege on the contrary that, other than the letter of April 29th, 1907, they made no further assertion or reference whatever to the contract of the plaintiff, other than that they were at all times ready to receive, and would receive, all business tendered to them by the plaintiff under the terms of the said contract aforesaid.

8. Answering Paragraph XVIII of the plaintiff's complaint, these defendants allege that the plaintiff commenced a third action against these defendants in the Superior Court of the State of California, in and for the City and County of San Francisco, in which he sought to recover the sum of \$24,000.00 from these defendants as damages for an alleged breach of the [28] said contract, though at said time there was then pending in the Superior Court of the State of California, in and for the City and County of San Francisco, another action by the plaintiff against these defendants for the sum of \$11,000 as damages for the breach of the said contract. The said third action brought by the plaintiff against these defendants, in which he sought to recover \$24,000, was brought to trial before the Superior Court of the State of California, in and for the City and County of San Francisco, and at such trial this plaintiff asserted that he had performed the contract for the months beginning April 1st, 1907, up to April 1st, 1908, in part, and had failed to perform it in part, whereupon the motion of the defendants that the plaintiff be nonsuited was granted.

9. These defendants further answering the said second cause of action in said complaint contained, deny that by such, or any, repudiation and, or, breach of agreement of defendants in the premises, or by reason of the breach of said contract on the part of the defendants alleged by plaintiff to have been committed by the defendants, or by reason of any breach of the said contract on the part of the defendants, plaintiff has sustained damages in being deprived of the benefits of the said agreement and, or, the moneys therein provided to be paid for services to be rendered by him from and including the month of May, 1908, together with legal interest upon said sums from the time that they would become due, or that he has sustained any damage, or that he has sustained damage in the sum of \$11,000, or in any other sum, or at all.

As and for their answer to the third cause of action set forth in the complaint above-mentioned, these defendants repeat all the preceding allegations of this answer, and make the same a part of their answer to the third cause of action [29] in that complaint, and further admit, deny and allege as follows:

10. These defendants have no information or belief upon the subject sufficient to enable them to answer, and therefore, and placing their denial upon that ground, they deny that after the month of April, 1907, and up to and including the month of March, 1908, plaintiff continued to carry on the business of an insurance broker the same as he had continued such business prior thereto. They deny that

he was unable to dispose of his insurance business after the month of April, 1907, to greater advantage by placing the same otherwise or elsewhere than with these defendants. They deny that by placing the said business with these defendants he was enabled as far as possible, or otherwise, or at all, to reduce the amount of damages to be recovered by him from the defendants, and they deny that, notwithstanding such, or any, alleged repudiation, or breach of agreement by these defendants, the plaintiff from and after April, 1907, up to and including the month of March, 1908, continued to place, or did place, with the defendants, or through them, any and, or, all, fire insurance business which he was able to secure and, or, control. And in this behalf, these defendants allege that the plaintiff failed, neglected and refused after the first day of April, 1907, up to and including the month of March, 1908, to perform and fulfill on his part any of the terms and conditions of the said agreement. And these defendants deny that he did duly, or otherwise, or at all, perform and, or, fulfill the terms and conditions of said agreement on his part to be performed. These defendants further allege that the plaintiff failed, neglected and refused to perform the conditions of the contract by him to be performed, [30] and did not place with these defendants, or through them, any and all fire insurance business which he was able to secure or control, but that the fire insurance business which he did bring to the offices of the defendants, he brought as a commission broker, retaining and deducting from the premiums collected by him such commissions as

are allowed to all brokers. These defendants further deny that they accepted and retained the services rendered by plaintiff from and including the month of April, 1907, to and including the month of March, 1908. And these defendants deny that he rendered any services to them from and after the first day of April, 1907; and deny that they accepted and, or, retained the fire insurance business during said period of time which this plaintiff brought to them, but that such business was brought upon a commission basis, such as is allowed and is the custom with all agents, and not under the terms of the contract which the plaintiff failed, refused and neglected to perform in any part whatsoever.

As and for their answer to the fourth cause of action set forth in the complaint above-mentioned, these defendants repeat all the preceding allegations of this answer, and make the same a part of their answer to the fourth cause of action in that complaint, and further admit, deny and allege as follows:

11. These defendants deny the allegations contained in paragraph marked XXI of the complaint herein, and deny that from and after the 1st day of April, 1907, to and including the month of March, 1908, the plaintiff placed any insurance through these defendants with companies other than the defendants in the name of the defendants as brokers, and that the defendants received the full, or any, commission upon such [31] insurance. And these defendants deny that in divers, or any, instances such insurance so placed was cancelled and, or, surrendered, by reason whereof, the insured became

entitled to a return of a proportional part of the premium, and that repayment of a proportional part of the premium was made by the plaintiff. And these defendants deny that the plaintiff collected from the companies whose policies had been so cancelled the proportional part of the premium repayable to the insured, and allege that they did not receive any part thereof. These defendants deny that the plaintiff made such, or any, repayments to the insured at the instance and, or, request of the defendants herein, and deny that they promised and, or, agreed to make good to and, or, pay to plaintiff such, or any proportional part of the commissions received by plaintiff, and deny that there is a balance thereon of \$237.45, or any balance whatsoever, or any sum whatsoever, due to plaintiff from these defendants by reason thereof, or otherwise.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto and as and for a cause of action against the plaintiff defendant, Caledonian Insurance Company, alleges:

12. That the said defendant now is, and during all of the times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland.

13. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to and to the same effect as the said contract set forth in said complaint. That

the said contract set forth in plaintiff's [32] complaint was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant, and should pay over the whole of such premiums to said defendant.

Said defendant alleges that, subsequent to the execution of the said contracts, and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that, upon said policies, there became due to defendant the premiums therefor, and said defendant is informed and believes and, upon such information and belief alleges, that plaintiff collected said premiums which had not become due and has at all times since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes, and upon such information and belief alleges, that the amount of said premiums, so collected by plaintiff, is the sum of \$2365.76.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of \$2365.76, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of \$2365.76,

together with interest thereon.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto, and as and for a cause of action [33] against the plaintiff, defendant, Rochester German Insurance Company, alleges:

14. That said defendant now is, and during all of the times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of New York.

15. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to and to the same effect as the said contract set forth in said complaint. That said contract set forth in plaintiff's complaint was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant and should pay over the whole of such premiums to said defendant.

Said defendant alleges that, subsequent to the execution of the said contracts and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that upon said policies,

there became due to defendant the premiums therefor; and said defendant is informed and believes and upon such information and belief alleges that plaintiff collected said premiums which had so become due and has at all times, since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes, [34] and upon such information and belief alleges that the amount of said premiums, so collected by plaintiff, is the sum of \$648.80.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of \$648.80, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of \$648.80, together with interest thereon.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto and as and for a cause of action against the plaintiff, defendant, Caledonian-American Insurance Company, alleges:

16. That said defendant now is and during all of the times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of New York.

17. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to and to the same effect as the said contract set forth in said complaint. That the said contract set forth in plaintiff's complaint

was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant, and should pay over the whole [35] of such premiums to said defendant.

Said defendant alleges that, subsequent to the execution of the said contracts and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that, upon said policies, there became due to defendant the premiums therefor; and said defendant is informed and believes and upon such information and belief alleges that plaintiff collected said premiums which had so become due and has at all times, since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes, and upon such information and belief, alleges that the amount of said premiums so collected by plaintiff is the sum of \$91.75.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of \$91.75, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of \$91.75, together with interest thereon.

Further answering said complaint, and each and every cause of action therein set forth, and by way of counterclaim and cross-complaint thereto and as and for a cause of action against the plaintiff, defendant, the Scottish Underwriters, alleges:

18. That defendant now is and during all of the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland.

19. That heretofore, and prior to the execution of the contract set forth in plaintiff's complaint, plaintiff and said defendant made, entered into and executed a contract similar to [36] and to the same effect as the said contract set forth in said complaint. That the said contract set forth in plaintiff's complaint was entered into between the said parties thereto upon the expiration of the said prior contract. That, under the said contracts, and each thereof, it was understood and agreed by and between the parties thereto, that plaintiff should collect all premiums which might become due under policies of insurance, which might be issued by the said defendant to persons whose insurance business might be furnished by plaintiff to the said defendant, and should pay over the whole of such premiums to said defendant.

Said defendant alleges that subsequent to the execution of the said contracts and each thereof, defendant issued certain policies of insurance to persons whose insurance business had been placed by plaintiff with defendant, and that, upon said policies,

there became due to defendant the premium therefor; that said defendant is informed and believes and upon such information and belief alleges that plaintiff collected said premiums which had so become due and has at all times since collecting the same, retained said premiums to his own use and benefit; and said defendant is informed and believes and upon such information and belief, alleges that the amount of said premiums, so collected by plaintiff, is the sum of \$631.85.

Said defendant alleges that plaintiff has not paid to said defendant the said sum of \$641.85, or any part thereof.

WHEREFORE, said defendant prays for judgment against plaintiff for the said sum of \$631.85, together with interest thereon.

WHEREFORE, defendants pray that plaintiff take nothing by this action, and that they have judgment for their [37] costs of suit herein; and defendant, Caledonian Insurance Company, prays for judgment against the plaintiff on its cross-complaint as herein set forth in the sum of \$2365.76, together with interest thereon; and defendant, Rochester German Insurance Company, prays for judgment against plaintiff on its cross-complaint as herein set forth in the sum of \$648.80, together with interest thereon; and said defendant, Caledonian-American Insurance Company, prays for judgment against the plaintiff on its cross-complaint as herein set forth for the sum of \$91.75, together with interest thereon; and the defendant The Scottish Underwriters, prays for judgment against the plaintiff on its cross-com-

plaint as herein set forth in the sum of \$631.81, together with interest thereon.

T. C. VAN NESS,
OTTO IRVING WISE,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

Thomas J. Conroy, being duly sworn, deposes and says: That he is an officer of the Caledonian Insurance Company, one of the defendants named herein, namely, the manager thereof and as such officer is authorized to verify this answer; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

THOS. J. CONROY.

Subscribed and sworn to before me this 16th day of June, A. D. 1911.

[Seal]

M. V. COLLINS,

Notary Public, in and for the City and County of
San Francisco, State of California. [38]

Due service and receipt of a copy of the within Answer & Cross Comp. is hereby admitted this 16th day of June, 1911.

GOODFELLOW, FELS & ORRICK,

Attorneys for Plff.

[Endorsed]: Filed Jun. 16, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.
[39]

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY et al.,
Defendants.

Answer to Cross-complaint.

Now comes the plaintiff, and for answer to the cross-complaint herein of the Caledonian Insurance Company, admits that the plaintiff, at divers times in the said cross-complaint referred to, collected premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies, as alleged in his original complaint herein, being the amounts for which, in said original complaint, he has offered to give credit. And plaintiff alleges that as to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of

this action, pay over the whole thereof to the said cross-complainant. [40]

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City and County of San Francisco, in the month of September, 1906, and a supplemental complaint was filed therein in the month of March 1907, and another action was commenced by him upon the same contract in the month of April 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answers, or any of them, filed in any of said actions, set up a counterclaim against the plaintiff; by reason whereof and of the provisions of section 439 of the Code of Civil Procedure of this State, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein.

And for answer to the cross-complaint of the defendant Rochester German Insurance Company, the plaintiff admits that he did at divers times in the said cross-complaint referred to, collect premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that

before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing [41] fire insurance business in or through fire insurance companies, as alleged in his original complaint herein, being the amounts for which, in said original complaint, he has offered to give credit. And plaintiff alleges that as to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of this action, pay over the whole thereof to the said cross-complainant.

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City and County of San Francisco, in the month of September 1906, and a supplemental complaint was filed therein in the month of March 1907, and another action was commenced by him upon the same contract in the month of April 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answers, or any of them, filed in any of said actions, set up a counterclaim against plaintiff; by reason whereof and of the provisions of section 439 of the Code of Civil Procedure of this State, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising

out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein.

And for answer to the cross-complaint of the defendant Caledonian-American Insurance Company, the plaintiff admits that he did at divers times in the said cross-complaint referred to, collect premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any [42] part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies, as alleged in his original complaint herein, being the amounts for which, in said original complaint, he has offered to give credit. And plaintiff alleges that as to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of this action, pay over the whole thereof to the said cross-complainant.

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City

and County of San Francisco, in the month of September, 1906, and a supplemental complaint was filed therein in the month of March, 1907, and another action was commenced by him upon the same contract in the month of April, 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answers, or any of them, filed in any of said actions, set up a counterclaim against plaintiff; by reason whereof and of the provisions of Section 439 of the Code of Civil Procedure of this State, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein. [43]

And for answer to the cross-complaint of the defendant the Scottish Underwriters, the plaintiff admits that he did at divers times in the said cross-complaint referred to, collect premiums as therein alleged; but denies that the plaintiff retained the same, or any of them or any part thereof, to his own use or benefit, and denies that the plaintiff has not paid to the defendant the amount stated in said cross-complaint, or any part thereof, but alleges that before the commencement of this action the plaintiff paid to the defendant all premiums at any time collected by him, save that subsequent to the month of April 1907, he did deduct and retain to himself the usual amount of brokerage allowed for placing fire insurance business in or through fire insurance companies as alleged in his original complaint, he has offered to give credit. And plaintiff alleges that as

to all other premiums at any time collected by him for said cross-complainant, he did, before the commencement of this action, pay over the whole thereof to the said cross-complainant.

And for further answer, this defendant says respecting any claims of the said cross-complainant under the contract made in the year 1906 in the said cross-complaint referred to, that an action was commenced by the plaintiff against the said cross-complainant in the Superior Court in and for the City and County of San Francisco, in the month of September 1906, and a supplemental complaint was filed therein in *in* the month of March 1907, and another action was commenced by him upon the same contract in the month of April, 1907, all as alleged in his complaint herein, and that the said cross-complainant did not in its answer, or any of them, filed in any of said actions, set up a counterclaim against plaintiff; by reason whereof and of the provisions of Section 439 [44] of the Code of Civil Procedure of this state, the said cross-complainant is debarred from maintaining any claim against the plaintiff arising out of the transactions set forth by the plaintiff in his said several complaints so filed in the said Superior Court as the foundation of his claims therein.

WHEREFORE, plaintiff prays that defendants take nothing by their cross-complaint, and that plaintiff have judgment in accordance with the prayer of the original complaint on file herein.

GOODFELLOW, EELLS & ORRICK,

Attorneys for Plaintiff.

State of California.

City and County of San Francisco,—ss.

S. W. Levy, being duly sworn deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing answer to cross-complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

S. W. LEVY.

Subscribed and sworn to before me, this 26th day of June, A. D. 1911.

[Seal]

M. V. COLLINS,

Notary Public in and for the City and County of San Francisco, State of California.

Service of a copy of the within is hereby acknowledged this 26th day of June, A. D. 1911.

T. C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Defts.

[Endorsed]: Filed June 26, 1911. Southard Hoffman, Clerk. [45]

At a stated term, to wit, the July Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Wednesday, the 4th day of October, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE COMPANY.

Order Amending Answer.

* * * * *

On motion of Mr. Wise it was ordered that defendants' answer may be amended as follows, to wit, on page 5, paragraph 5 line 10 and insert in lieu thereof the words and figures "April 1, 1907" strike out the words and figures "April 1, 1908"/and on page 8 paragraph 9 lines 2 and 3 strike out the words and figures "May 1908" and insert in lieu thereof the words and figures "April 1907." [46]

* * * * *

At a stated term, to wit, the July Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Thursday the 5th day of October, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY

vs.

CALEDONIAN INSURANCE CO. et al.

Order Allowing Plaintiff to File Amendment to Complaint.

The parties hereto by their respective counsel and the jury, heretofore impaneled herein being present the trial hereof was resumed and upon motion of Mr. Goodfellow it was ordered that plaintiff may file an amendment to the complaint. [47]

* * * * *

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY et al.,
Defendants.

Amendment to Complaint.

Plaintiff by leave of Court, amends the prayer of his complaint so that the same shall read as follows:

“Wherefore, in this action plaintiff prays judgment against the defendants in the sum of eight thousand six hundred and forty-nine and 7/100 (8,649.07) dollars, together with interest on \$1,000 from April 30th, 1907, and interest on \$1,000 from May 31st, 1907, and interest on \$515.97 from June 30th, 1907, and interest on \$721.60 from July 31st, 1907, and interest on \$430, from August 31st, 1907, and interest on \$638.60 from September 30th, 1907, and interest on \$637.90 from October 31st, 1907, and interest on \$808.37 from November 30th, 1907, and

interest on \$684.36 from December 31st, 1907, and interest on \$782.05 from January 31st, 1908, and interest on \$800.95 from February 28th, 1908, and interest on \$802.82 from March 31st, 1908, and interest on \$842.20 from April 30th, 1908, and interest on \$858. from May 31st, 1908, and interest on \$878.30 from June 30th, 1908; and for costs [48] of suit."

GOODFELLOW, EELLS & ORRICK,

Attorneys for Plaintiff.

[Endorsed]: Filed October 5, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [49]

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY,
ROCHESTER-GERMAN INSURANCE
COMPANY, CALEDONIAN-AMERICAN
INSURANCE COMPANY, and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the

sum of eleven thousand seven hundred ten & 57/100
(\$11,710.57) Dollars.

TIMOTHY HOPKINS,

Foreman.

[Endorsed]: Filed Octr. 5, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [50]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, Northern District of California.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY,
ROCHESTER-GERMAN INSURANCE
COMPANY, CALEDONIAN-AMERICAN
INSURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Judgment [Filed and Entered October 5, 1911].

This cause having come on regularly for trial upon the 4th day of October, 1911, being a day in the July, 1911, Term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, W. S. Goodfellow and W. H. Orrick, Esqrs., appearing on behalf of plaintiff and O. I. Wise, Esq., appearing on behalf of the defendants, and the trial having been proceeded with upon the 5th day of October in said year and term and evidence, oral and documentary, upon be-

half of the respective parties having been introduced and closed and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, viz.: "We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of eleven thousand seven hundred ten and 57/100 (\$11,710.57) Dollars. Timothy Hopkins, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs;

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that S. W. Levy, plaintiff, do have and recover of and from Caledonian Insurance [51] Company, Rochester German Insurance Company, Caledonian-American Insurance Company, and The Scottish Underwriters, defendants eleven thousand seven hundred ten and 57/100 (\$11,710.57) Dollars, together with his costs in this behalf expended taxed at \$64.35.

Judgment entered October 5, 1911.

SOUTHARD HOFFMAN,

Clerk.

By W. B. Maling,

Deputy Clerk.

A true copy. ATTEST:

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By W. B. Maling,

Deputy Clerk.

[Endorsed]: Filed October 5, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.
[52]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, in and for the Northern District
of California.*

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INS. CO., et al.

Clerk's Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said Circuit Court this 5th day of October, 1911.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed October 5, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [53]

At a stated term, to wit, the March term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 10th day of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. etc., et al.

Order Spreading Mandate on Minutes.

Upon motion on behalf of T. C. Van Ness, Esq., attorney for defendants, it was ordered that the mandate of the United States Circuit Court of Appeals, herein, be filed and spread upon the minutes of this court, which said mandate is in words and figures following, to wit: [54]

* * * * *

[Mandate of U. S. Circuit Court of Appeals.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District
[Seal] Court of the United States for the Northern District of California, Second Division,
Greeting:

Whereas, lately in the District Court of the United

States for the Northern District of California, Second Division, before you, or some of you, in a cause between S. W. Levy, Plaintiff, and Caledonian Insurance Company et al., Defendants, No. 15,247, a judgment was duly filed and entered on the 5th day of October, A. D. 1911, in favor of the said plaintiff and against the said defendants; which said judgment is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), [55] as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error agreeably to the Act of Congress in such cases made and provided fully and at large appears:

And Whereas, on the 16th day of May, in the year of our Lord one thousand nine hundred and twelve, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly argued and submitted to the Court for consideration and decision. [56]

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the plaintiffs in error and against the defendant in error, and that this cause be, and hereby is remanded to the said District Court for a new trial.

It is further ordered and adjudged by this Court that the plaintiffs in error recover against the de-

fendant in error for their costs herein expended, and have execution therefor.

(Oct. 7, 1912.)

You, therefore, are hereby commanded that such new trial, execution and further proceedings be had in the said cause in accordance with the opinion and judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said District Court of the said District Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the third day of March, in the year of our Lord one thousand, nine hundred and thirteen.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of costs allowed and taxed in favor of the plaintiffs in error and against the defendant in error, as per annexed bill of items taxed in detail: \$199.25.

F. D. MONCKTON,

Clerk. [57]

**Bill of Items Annexed to Mandate Pursuant to
Section 5, Rule 31.**

Debit Item No.	Debit Items.	Dr.	Cr.
1	Docketing Cause and Filing the Record....	5 00	
2	Entering —2 Appearance	50	
3	Entering Continuance		
4	Entering 3 Order	60	
5	Filing 5 Papers	1 25	
6	Filing Briefs for Each Party Appearing (2)	10 00	
7	Filing Supp. Brief Plff. in E.....	5 00	
8	Filing		
9	Filing Argument		
10			
11	Transferring Cause on Printed Calendar (2)	2 00	
12	Drawing, Filing and Recording Decree or Judgment	1 65	
13			
14	Filing Petition for a Rehearing.....	5 00	
15	“ Ans. to Do.	5 00	
16	Filg. Reply to Do.	5 00	
17			
18			
19	Issuing Mandate, \$5.00; Costs and Copy, \$0.40	5 40	
20			
21	Total, Miscellaneous Costs.....	46 40	
22	Expense, Printing Record.....	96 50	
23			
24	Total of Debit Items.....	142 90	

Credit Item No.	Credit Items.	
1	Deposited Account Misc. Costs Plff. in Error	34 95
2	“ “ “ “ Deft. in Error	11 45
3		
4		
5	Expense, Printing Record	96 50
6		
7	Total of Credit Items.....	142 90
8	Balance	
	Totals	142 90 142 90

Item No.	Itemized Bill of Costs Allowed and Taxed.	Amount.
1	Certified Cost of Transcript from Court	
	Below	47 80
2		
3	Deposit.....Account Misc. Costs.....	34 95
4	Total Expense, Printing Record.....	96 50
5		
6		
7	Attorney's Docket Fee	20 00
8	Balance Costs	

Total (Inserted in Body of Mandate)

Taxed at 199 25

Attest: F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. [58]

[Endorsed]: No. 15,247. U. S. District Court, in Northern District of California, Second Division. No. 2113. United States Circuit Court of Appeals for the Ninth Circuit. Caledonian Insurance Co., etc., et al., vs. S. W. Levy. Mandate. Filed and spread on the minutes of the said District Court, March 10, 1913. W. B. Maling, Clerk. [58]

*In the District Court of the United States, Northern
District of California.*

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, et al.,
Defendant.

Stipulation Waiving Jury.

IT IS HEREBY STIPULATED that a jury in
the above-entitled action is waived.

Dated, Dec. 11th, 1913.

GOODFELLOW EELLS & ORRICK,

Attorneys for Plaintiff.

THOMAS C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Defendants.

[Endorsed]: Filed April 17, 1914, Walter B. Mal-
ing, Clerk. [59]

At a stated term, to wit, the July term, A. D. 1914,
of the District Court of the United States of
America, in and for the Northern District of
California Second Division, held at the court-
room in the City and County of San Francisco,
on Friday, the 25th day of September, in the
year of our Lord one thousand nine hundred and
fourteen. Present: The Honorable WILLIAM
C. VAN FLEET, District Judge:

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. et al.

Order for Judgment.

This cause heretofore tried and submitted being now fully considered and the Court having rendered its oral opinion thereon, it was ordered that judgment be entered in favor of plaintiff and against defendants in the sum of \$14,081.53 and for costs [60]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, ROCHESTER GERMAN INSURANCE COMPANY, CALEDONIAN-AMERICAN INSURANCE COMPANY and THE SCOTTISH UNDERWRITERS,

Defendants.

Judgment [Filed and Entered September 25, 1914].

This cause having come on regularly for trial on the 10th day of December, 1913, before the Court sitting without a jury, and a trial by jury having been specially waived by written stipulation of the parties; Hugh Goodfellow and W. H. Orrick, Esqrs., appear-

ing as attorneys for the plaintiff and T. C. Van Ness and Otto I. Wise, Esqrs., appearing as attorneys for the defendants; and the trial having been proceeded with on the 11th day of December, 1913, and evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, briefs having been filed, and the Court, after due deliberation, having ordered that judgment be entered in favor of plaintiff and against said defendant in the sum of Fourteen Thousand Eighty-one and 53/100 (\$14,081.53) Dollars, and for costs:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that S. W. Levy, plaintiff, do have and recover of and from Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, defendants, the sum of Fourteen Thousand Eighty-one and 53/100 (\$14,081.53) Dollars, together with his costs in this behalf expended taxed at \$65.95. [61]

Judgment entered September 25, 1914.

WALTER B. MALING,

Clerk.

A True Copy. ATTEST:

[Seal] WALTER B. MALING,

Clerk.

[Endorsed]: Filed Sept. 25, 1914. Walter B. Maling, Clerk. [62]

*In the District Court of the United States, for the
Northern District of California.*

No. 15,247.

S. W. LEVY,

vs.

CALEDONIAN INSURANCE CO. et al.

Clerk's Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 25th day of September, 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed Sept. 25, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[63]

[Proceedings Had December 11, 1913.]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, a Corporation, and ROCHESTER GERMAN INSURANCE COMPANY, a Corporation, CALEDONIAN-AMERICAN INSURANCE COMPANY, a Corporation, and SCOTTISH UNDERWRITERS, a Corporation,
Defendants.

DEFENDANTS' BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on the 11th day of December, 1913, before the above-entitled court, Hon. Wm. C. VAN FLEET, Judge of said court presiding, plaintiff appearing by his counsel, Messrs. Goodfellow, Eells & Orrick, and defendants appearing by their counsel, T. C. Van Ness, Esq., and Otto Irving Wise, Esq., said cause came before the Court sitting without a jury, a jury having been expressly waived by stipulation of the parties, duly filed in the court, and thereupon the following evidence and exhibits were introduced and the following proceedings were had, to wit:

Mr. Orrick, who made the opening statement on behalf of plaintiff, **stated the substance of the first, second and fourth counts of the complaint, and the**

facts which plaintiff intended to establish thereunder. With reference to the third count, he said:

“The third count is not involved here for the reason it proceeds on the idea of performance and since it is the law of the case, as I understand it, that from and after the end of April, 1907, the plaintiff did not perform because he had [64] retained 15 per cent to cover office expenses out of the premiums instead of remitting the whole of the premiums we are not concerned with the third count. Your Honor will recall the argument made here at the former trial, with respect to the retention of the 15 per cent as not involving a material breach of the contract. I am not going into that because I consider that we are bound by the law of the case, and I shall not attempt to make any argument, or to take any position at this hearing which in any way will involve a disregard of what the law of the case has established on the appeal. So I will say nothing further with reference to performance after the end of April, 1907, or with reference to the third count, for that is the count which is devoted to the theory of performance and upon which we went to the jury at the former trial.

The COURT.—That was the proposition upon which the case was reversed, was it not?

Mr. ORRICK.—Yes.”

Mr. Wise then made the opening statement on behalf of defendants.

Plaintiff's counsel thereupon offered to submit the case on the evidence taken on the former trial thereof as shown in the reporter's transcript of said trial,

supplemented by such additional testimony as should be offered. In the course of the discussion which ensued, Mr. Van Ness said:

“MR. VAN NESS.—I am willing to admit, and it seems to me that the admission is as broad as anything you could claim. In the beginning we took the position that by reason of the destruction of San Francisco we were released and so notified you, and you considered we were not released and insisted on going on with the contract. I told you that if we were wrong [65] in our view we would pay you the \$1000 a month. We took that position from the beginning to the end.”

The Court then ordered, pursuant to the agreement of the parties, that the evidence taken at the former trial as shown by the reporter's transcript thereof, should be considered in evidence at this trial.

The following is the substance of the evidence at the former trial.

[Testimony of D. J. Wren, for Plaintiff.]

D. J. WREN, called as a witness for the plaintiff, being duly sworn, testified as follows:

I have been in the employ of plaintiff for about twenty-five years. He was sick in April, 1907. During the month of April, 1907, I took complete charge of the bookkeeping of plaintiff's business and have been familiar with Mr. Levy's business from that time until the end of the contract with defendants.

MR. WISE.—I will admit as a rule it takes the Supreme Court more than a year to reach an appeal from the Superior Court.

(Testimony of D. J. Wren.)

Mr. Conroy, the person who made the contract on behalf of the defendants, was their agent at all the times referred to in the pleadings in this case.

The contract with defendants was made in 1906 and was performed by plaintiff up to and including March, 1907.

Q. Will you state whether or not after that time there was any difference in the performance of the contract of furnishing business to the insurance companies?

A. Except in the collection of the commissions (the witness continuing) the business went on the same and he furnished the business to them as before. Mr. Levy turned over to these insurance companies, or through them, all of the insurance business which he controlled. After the month of March, [66] 1907, Mr. Levy placed all the insurance he could in Mr. Conroy's office, but if Mr. Conroy could not take any business we offered, we placed it on the outside, but to his credit as the broker. Mr. Levy after the month of March, 1907, collected fifteen per cent commission and retained it for that year, after notifying Mr. Conroy's office that he was going to do that and hold it for office expenses. The first payment we made Mr. Conroy's office was in June, on business that was placed during the year from April, 1907, to April, 1908; when we made that payment, instead of making Mr. Conroy a payment of the gross amount of the premium, we paid him net, and we told him the reason we were doing so was we withheld those commissions to pay office expenses. The money was

(Testimony of D. J. Wren.)

there always on demand. Any time Mr. Conroy made a demand for money, it would be turned over to him. I so informed Mr. Anderson, his cashier, when I made my first payment in June, 1907. Defendants did not pay Mr. Levy anything for the months of April, May or June, 1907.

Q. Generally, how long is it after a policy is issued before you collect the premiums?

A. Sixty days. We send the assured a bill sixty days prior to collection day. One of the clerks in Mr. Levy's office would go around and do the collecting. Then a day or two after that a statement would be made out of our office of the collections and turned over to Mr. Conroy's office with a check.

We paid Mr. Conroy's office twice a month, immediately after collection day. The 13th and 28th were collection days. If a policy was made out on the 1st of March, we did not bill the assured until the 1st of June, or until the collection day, the 13th of June. We did not bill the assured for sixty days. At that time we were allowed sixty days for collection of [67] premiums. The first or second day after we collected moneys from the assured, on collection day, we settled with Mr. Conroy. If money would come in in the middle of the week, or between the first of the month and collection day, we did not pay that in until a collection day, when we made a general statement of the entire amount. From and after March, 1907, until the end of March, 1908, Mr. Melville S. Levy continued in the employ of his father, S. W. Levy.

(Testimony of D. J. Wren.)

I am familiar with the position taken by the insurance companies that they would not remain bound by this contract and that they claimed it was at an end.

Q. Did you ever have any conversation with Mr. Conroy afterwards about this matter?

A. Except to ask for the \$1,000.00 a month which Mr. Levy sent me down to do, or Mr. Coggins or his son.

Q. I will ask you whether or not they continued to claim that they were not bound by that contract, until the Supreme Court judgment came out about a year and a half after the contract was at an end?

A. They did, yes, sir. After the month of March, 1907, Mr. Levy conducted the same character of business that he had done before. The brokerage of fifteen per cent which I have referred to was a uniform rate among the insurance companies in San Francisco at that time.

Q. Any person giving insurance business whether to these defendants or to any other companies in town would get the same commission, fifteen per cent?

A. Yes, sir. There was no advantage. They all paid it. It was here stipulated that the insurance rates were not suspended in San Francisco at any time during the life of this contract.

After the month of March, 1907, when we offered Mr. Conroy's [68] companies business, they would take it whenever they could write it. When we placed business with other companies in their

(Testimony of D. J. Wren.)

name, they made no objection at any time.

The COURT.—Did you pursue the same course and place all your business through that office after that date, the same as before?

A. Yes, your Honor.

Q. But after that date you did deduct the 15 per cent commission on premiums?

A. In making our payments, yes, sir.

Mr. GOODFELLOW.—Q. After the month of June I thought you said?

A. It was during the month of June, but that was for the insurance of the month of April, previously placed.

Mr. GOODFELLOW.—Q. Now, I want you to explain about these return commissions, that is, about this small item of \$237.45.

Counsel for the respective parties thereupon stipulated that the allegations of the complaint respecting the practice pursued in the matter of said return premiums were true, but no stipulation as to the amount of said returned premiums was entered into by defendants' counsel.

Mr. GOODFELLOW.—The amount alleged here is \$237.45.

Mr. GOODFELLOW.—Q. I will ask you, Mr. Wren, whether or not there is a balance of that amount which was not paid to you by Mr. Conroy's companies on account of these returned commissions?

A. Yes, sir, there was that amount, \$237.45.

Cross-examination.

These figures have all been gone over by Mr. Con-

(Testimony of D. J. Wren.)

roy's cashier previously to our coming here.

Q. Now, Mr. Wren, in this case, there is no controversy as to the first 12 months' period of these two years; in other [69] words, as you know, Mr. Levy has received the money for the first 12 months; that is correct, is it not? A. That is correct.

Q. Beginning April 1, 1907, do you know whether the same proceedings were had in your office for the procuring of business as obtained prior to that time?

A. We used the same methods, yes, sir.

Q. You made no distinction in the method of doing it from what you had done previously—you followed the same course? A. Yes.

Q. Neither in form nor in amount nor method—there was no change?

A. We pursued the same methods as we had done theretofore.

Q. The only difference was that prior to April, 1907, you did not deduct the commissions?

A. That is correct.

Q. After April 1, 1907, and for the second twelve-month period, Mr. Levy deducted from the volume of business which he produced fifteen per cent commission, the same commissions which any broker would have received who brought the business into Mr. Conroy's company? A. Yes, sir.

Q. Now you have said on direct examination that you do not know whether the company paid \$1,000 for May or June; you mean by that, that you did not get any money?

(Testimony of D. J. Wren.)

Mr. GOODFELLOW.—He said they did not pay him any money.

A. I did not receive it. The money previous to the fire came in to me in a check, \$1,000 a month; I never received any money after that.

Mr. Melville S. Levy was employed by his father during all of the second twelve-month period. He was there during the entire year, with the exception of while he was home in bed sick. I do not know how long a period his sickness covered. It was no more than a month. Mr. Melville S. Levy devoted all [70] of his time to the business outside of the period of his illness.

Mr. WISE. — Q. Mr. Goodfellow asked you whether in April or May, 1907, the defendant companies did not continue to say to you that they were not bound, and I think you answered yes; let me direct your attention to this: During the beginning of the second twelve months' period, did not have any conversation with Mr. Conroy about the contract?

A. Well, I could say that I did, but I could not give any particular dates. I would meet Mr. Conroy in the office and he would say: "What are you doing here?" I would say, "Well, I came down for that one thousand dollars salary you owe us." I have spoken to him in that strain on more than one occasion. So have other members of the office force.

(The witness continuing.) The defendants continued to handle and to write the business that we presented during the second twelve months' period

(Testimony of D. J. Wren.)

the same as they had done before. All the business we would bring into their office they would write for us provided they could take it. They did not change their methods in any way whatever during the second twelve months' period.

Q. Did you continue, after April 1st, 1907, to make a monthly demand for the \$1,000.00?

A. Personally, no, not myself.

Redirect Examination.

In the first and second years I spoke to Mr. Conroy on more than one occasion about the payment of the \$1,000.00 a month. He just laughed at me when I asked him for it. I was in and out of that office every day. I do not know whether it was monthly that I spoke to him; I might have asked him two or three times a week.

Recross-examination.

Q. Do we understand you correctly that it was during the [71] entire second twelve-month period that you frequently said to Mr. Conroy how about our check for \$1,000.00?

A. When I would meet Mr. Conroy I would ask him about our \$1,000.00 check.

The COURT.—Q. How often did that occur during the second twelve months?

A. Oh, on several occasions anyway. Mr. Levy instructed me to notify Mr. Conroy's office that we would withhold the commissions for the second year to pay the office expenses, which I did. This was in June, 1907, when we were making the first payments of the second year's business. About the 3d of

(Testimony of D. J. Wren.)

June, 1907, I called on Mr. Conroy, at Mr. Levy's request, and told him that from that time we would deduct fifteen per cent of the commissions collected for office expenses.

Q. Do you know whether after that interview you were ever authorized to make your monthly visit and demand the \$1,000?

A. I don't think I was. I was not told not to make the visit either. Mr. Conroy never said he was willing to carry out the contract, or pay the \$1,000 a month.

Mr. GOODFELLOW.—That is the case for the plaintiff.

[Testimony of Thomas J. Conroy, for Defendants.]

THOMAS J. CONROY, called as a witness for the defendants being duly sworn, testified as follows:

For some years prior to the earthquake, and since I have been the general agent of the four defendants insurance companies, my offices received all business which Mr. Levy brought to me during the second twelve month period of the contract in controversy the same as we had done prior thereto. The method of payment for that business was changed. In June, 1907, Mr. Levy deducted his commissions for April business. The customary *broker* of fifteen per cent was deducted.

Q. At that time was anything said to you as to the reason [72] for such deduction?

A. Nothing.

Q. Did you laugh at Mr. Wren when he came to you?

(Testimony of Thomas J. Conroy.)

A. No, sir. The relations between Mr. Levy's employees and myself have always been very friendly. Sometimes the demands would be made by Mr. Wren, sometimes by Mr. Coggins (Mr. Levy's clerk), or sometimes by Mr. Levy's son. Mr. Wren would come in and ask for the \$1000.00 and we would say: "Well, Dan, I don't think we owe you this money, but if we do, we will pay it." That statement was made by me as often as they came in. The demands were made only during the first year period.

Mr. WISE.—Mr. Goodfellow, you wrote a letter to Mr. Conroy of which this is a copy. I cannot put my hands upon the original right now. Do you recognize it?

Mr. GOODFELLOW.—Oh, yes.

Mr. WISE.—I would like to ask permission to introduce the letter in full as evidence.

Mr. GOODFELLOW.—I have no objection.

(The letter was here marked Defendants' Exhibit No. 1, and read as follows:)

**[Defendants' Exhibit No. 1—Letter, April 27, 1907,
Goodfellow & Eells to Thomas J. Conroy et al.]**

“San Francisco, Apr. 27—07.

Office of Goodfellow & Eells, San Francisco, Cal.

Thomas J. Conroy, Esq.,

Caledonian Insurance Company:

Rochester German Insurance Company:

Caledonian-German Insurance Co., and

The Scottish Underwriters.

Dear Sir:

We are instructed by Mr. S. W. Levy to inform you of his intentions respecting the contract which

he made with you dated March 3rd, 1906, to wit:

He will continue to render his services under the contract until the end of the present month, at which time he will make demand upon you for his compensation, according to the contract. If you still refuse payment and still persist in claiming that the contract has been rescinded, he will consider that you have committed a breach of the contract and will sue you once and for all for damages.

Mr. Levy is, and always has been, ready and willing [73] to carry out the contract on his part and to continue it to the end of the term of two years. He hopes that you will conclude to abandon the position which he considers, and is advised to be utterly untenable, to wit: that the contract has been terminated by the destruction of property in the burned district.

We are,

Yours very truly,

GOODFELLOW & EELLS.

P. S. We beg to notify you also that we have advised Mr. Levy for his protection, to issue a writ of attachment in each of the cases pending, which writ will be issued on Monday next; we give you this notice in order that you may be prepared to furnish the necessary bond on release of attachment."

Q. Did I understand you to say that after April 1, 1907, there was no discussion between you and Mr. Levy or his representatives in reference to the contract? A. Nothing.

[Testimony of S. W. Levy, for Defendants.]

S. W. LEVY, called as a witness for the defendants, being first duly sworn, testified as follows:

I am the plaintiff in this action. The letter you now show me, addressed to the defendants and dated June 22, 1906, bears my signature.

(The letter is then introduced in evidence, marked Defendants' Exhibit No. 2, and reads as follows:)

**[Defendants' Exhibit No. 2—Letter, June 22, 1906,
S. W. Levy to Caledonian Insurance Co. et al.]**

“S. W. Levy,

Commission Merchant and Insurance Agent.

Telephone Main 143

Temporary Address, 1629 Broadway,

San Francisco, June 22d, 1906.

Caledonian Insurance Company.

Scotch Underwriters.

Caledonian-American Insurance Co.

Rochester German Insurance Co.

City.

Gentlemen:

Referring to your note of June 21st, 1906, in which you declare that my contract with you, dated March 31st, 1906 by which you undertook to pay me \$1000.00 monthly for two years from April 1st, 1906, is ‘rescinded,’ I beg to reply that I do not recognize your right, so to terminate the contract, and that I insist on its performance. I have in all respects kept this contract on my part, and am now doing so, and I intend to keep it, fully and fairly, during its term; and I shall expect to be paid by you, the stipulated consideration. You are now in arrears for April and

May, and unless full payment for three months is made to me by July 1st, I shall be compelled to bring suit against you, jointly and severally, for the sum then due.

Very truly yours,

S. W. LEVY." [74]

Subsequent to the writing of this letter and for the first 12 month period of this contract, I brought my business to the defendant companies and made no deductions for commissions. I was not paid the \$1,000 per month but the \$12,000 was paid long afterwards, after the decision of the Supreme Court.

It was here stipulated that the counterclaim and cross-complaints filed by the defendants in this case be withdrawn as far as this case is concerned.

After the Court had ordered that the testimony at the former trial be considered in evidence, plaintiff's counsel called Thomas J. Conroy as a witness for plaintiff, who testified as follows:

[Testimony of Thomas J. Conroy, for Plaintiff.]

Mr. ORRICK.—Q. Mr. Conroy, during the years 1906, 1907 and 1908 you were manager of these four defendant insurance companies, were you not?

A. Yes, sir.

Q. During that period of time and after April 1st, 1906, do you recall Mr. Levy or any of his office force having called upon you making demand for the \$1,000 monthly under the contract of March 31st, 1906? A. Yes, sir.

Q. Please state what occurred on those occasions?

A. This was during the first twelve months?

Q. Yes.

(Testimony of Thomas J. Conroy.)

A. Usually Melville Levy would call to make demand for the \$1,000 a month. My reply was I did not think I owed him the money; the exact wording now of course I cannot remember because it was so many years ago. Whether or not I used the word "rescinded" I am not able to state positively at this time; I may have.

Q. I call your attention to the testimony given by you in the case of S. W. Levy against Caledonian Insurance Company before Judge Hosmer?

A. Judge Seawell. [75]

Q. I think it was tried before Judge Hosmer and then Judge Hosmer died and Judge Seawell finally decided it. That was the case he decided in favor of Mr. Levy in which you stated in answer to these questions as follows:

"Mr. VAN NESS.—Q. Speaking about the matter of those payments in your office by Mr. Levy, do you, of your own knowledge, know that Mr. Levy was informed that the companies would not, in accepting those premiums, recognize the previous contract that had been made? A. Yes, sir."

Another question by Mr. VAN NESS.

"Q. With relation to the matter of Mr. Levy's demand for payment under the contract, what do you know concerning information to himself and those coming to your office to make those demands? Tell us what the facts are in regard to that.

"A. Application was made each month by Mr. Melville Levy, Mr. S. W. Levy may have been there once, but Mr. Melville Levy came there each month

(Testimony of Thomas J. Conroy.)

and asked for the \$1,000 for his father, and he was told that"—then the answer continues—"we could not pay it, that the contract had been rescinded." Was that testimony correct?

A. At that time, yes.

Q. You stated that this occurred during the first year, have you any recollection as to whether any demands were made during the second year?

A. None.

Q. You have no recollection on that subject?

A. No, sir, there were no demands made.

Q. Now, Mr. Conroy, these premiums which Mr. Levy remitted to you, what was the course of business respecting the time when they were remitted after the policies were issued?

A. After the destruction of the city the Board of Underwriters fixed a limit of 45 days in which premiums had to be paid. [76] There were some extensions to 60 days; it was Mr. Levy's custom always to present a statement of his business written 60 days prior and to send a check less 15 per cent commission on the second year.

Q. So the premiums were not payable to your office when policies were issued by your office but 45 days or more thereafter?

A. Not at all. Mr. Levy as broker would receive the policies and delivered them; whether or not he collected them immediately or 45 or 60 days after I do not know. His custom during all the time he was connected with the office was to make a statement every 60 days.

(Testimony of Thomas J. Conroy.)

Mr. ORRICK.—There was a letter written on the 21st of June, 1906, which does not appear in the record at the first trial, and it is as follows: “San Francisco, June 21, 1906. S. W. Levy, Esq., San Francisco, Cal. Dear Sir: This will serve to notify you that the consideration for the agreement under date of March 31, 1906, heretofore entered into between yourself and the undersigned companies, having by reason of the recent destruction of San Francisco, failed in a material respect, said agreement has been and hereby is rescinded.” That is signed by R. C. Christopher representing the Caledonian Insurance Company, The Scottish Underwriters and the Caledonian-American Insurance Company. Mr. Atwood representing the Rochester German Insurance Company.

Mr. VAN NESS.—That is our original letter.

Mr. WISE.—No objection to it.

Mr. ORRICK.—Will you admit, Mr. Van Ness, that on April 25th, 1907, you filed this brief in the Superior Court and served a copy of it on us? [77]

Mr. VAN NESS.—I suppose the brief speaks for itself.

Mr. ORRICK.—They take the position in their brief, and I know it is Mr. Van Ness' position all along, at least down to the time the Supreme Court rendered its decision that the contract was rescinded.

Mr. VAN NESS.—We will object to the papers filed in other proceedings. I am making the admission as broad as it can be made. I do not want to go

(Testimony of Thomas J. Conroy.)

back and be held to anything I stated in that brief.

The COURT.—You can read the statement.

Mr. ORRICK.—Was it your position or the position of the companies in April, 1907, that this contract had been rescinded and did not bind the defendant companies?

Mr. VAN NESS.—That has always been my position and I so advised the companies and they proceeded on that advice by reason of the destruction of San Francisco the law gave us the right to rescind the contract, and you got that letter, but Mr. Levy refused to accept the rescission and went on and took the business and we took the business.

Mr. ORRICK.—I want to call Mr. Wren.

The Court.—What do you want to show by this witness?

Mr. ORRICK.—May it please the Court, I wish to show by Mr. Wren and it may be clear enough now from the record that during April and May Mr. Levy paid these defendants companies without any deduction whatever.

Mr. VAN NESS.—For the preceding last two months.

The COURT.—For the months of February and March.

Mr. WISE.—We admit that.

Mr. VAN NESS.—We admit that the premiums due on the business in February and March, 1907, were thereafter paid to the [78] company.

Mr. GOODFELLOW.—The admission we want is that every premium he collected during the months

(Testimony of Thomas J. Conroy.)
of April and May was paid over.

Mr. WISE.—What Mr. Goodfellow is trying to get at is something to this effect. If they collected moneys in the month of April or May, 1907, no matter for which month's business they collected the money they turned over to us all they collected. That is not the fact.

The COURT.—I must confess I think you are fighting over straws; I do not care about that. I will determine that for myself.

Mr. GOODFELLOW.—I do not see that it adds anything to the case at all.

The COURT.—What does the testimony show here? The testimony shows that the settlements under this contract between Levy and the insurance company for premiums was made every 60 days. Now, it has already appeared here that a 60 day period settlement took place on the 1st of June. There is no question but what he had paid over regularly at those periods all previous premiums.

Mr. ORRICK.—That is all I had in mind. That is our case.

The foregoing constitutes and is all the evidence taken and introduced, or pursuant to stipulation considered as evidence taken and introduced, upon the foregoing trial herein.

Thereafter, and on the 25th of September, 1914, the Court rendered an oral opinion in the above-entitled action as follows:

[Opinion (Oral).]

The COURT (Orally).—In the case of Levy vs.

Caledonian Insurance Company, on a former trial before a jury verdict and judgment went for plaintiff, but upon appeal this judgment was reversed and the cause remanded. The case has now been tried a second time before the Court, the jury being waived. [79]

The material question upon which judgment principally turns is whether the cause of action stated in the second count of the complaint, upon which plaintiff now relies, is one "upon the contract," that is, based upon the theory of performance of the contract, as contended by the defendants, or is one to recover damages for the defendants' breach in its repudiation of the contract, as contended by plaintiff. If the former, plaintiff's right to recover is concluded by the law of the case as announced by the Circuit Court of Appeals on the appeal from the former judgment (199 Fed. 407); since the evidence as to what was done by the parties tending to establish performance was substantially the same on this trial as on the former. If the latter, then the law of the case does not apply, since the theory upon which plaintiff is now proceeding was not involved in the judgment of the Appellate Court.

That a party is entitled to plead his cause of action in different forms and in varied and inconsistent counts there is no question, and that a failure to make a cause under one count will not preclude recovery under another and different count, although involving an entirely distinct and different theory, is equally true. It cannot always be definitely known what theory as represented by the different forms of pleading

the evidence in its legal effect will sustain, and a party is not required to hazard his right to recover upon a single cast. As to the main cause of action alleged, it is asserted in two forms, the one alleging and based upon the theory of a full performance of the contract and a right to recover thereunder, which was the count relied upon on the former trial; the other, under which plaintiff now seeks recovery, alleging the facts fully as to what was done by the parties to the contract and seeking [80] damage as for its repudiation or breach by defendant. I am of opinion that the latter count cannot be said in its legal aspects to "count upon the contract" in the sense insisted by defendants—that is, it does not proceed upon the theory of performance but is to be regarded as stating a cause of action arising upon defendants' breach. This being so, does the evidence sustain that theory and entitle plaintiff to recover under that count? There is no material conflict in the evidence as to what was done, and the facts need not be recited in detail. In April, 1907, plaintiff notified defendants by letter that if they still continued to maintain their right to renounce or repudiate the contract and refuse to carry it out, he should at the end of that month treat their repudiation as final and sue them as for an entire breach. They answered that they should maintain the same attitude until it should be finally determined by the courts that it was unauthorized, and accordingly plaintiff did sue them in the Superior Court as for a total breach, and that action was maintained until plaintiff was nonsuited, whereupon the present action was brought. During the

remainder of the period covered by the terms of the contract, while plaintiff continued as before to take his insurance to the defendants, he from that date withheld the usual brokerage fees of fifteen per cent. instead of paying the premiums in their entirety to defendants as stipulated in the contract. It is true that this was done in a manner to indicate that plaintiff believed, or at least hoped, that the course he was pursuing would constitute a substantial compliance with the terms of the contract, and enable him to recover therefor, and that was the theory upon which the first trial proceeded. In fact there is no doubt but that what plaintiff did in the [81] premises was intended to give him "two strings to his bow." In other words, that if his acts did not constitute a performance it would put him in a position to recover as for a breach. This aspect of the evidence is what is largely relied upon as characterizing the action as one proceeding on the theory of performance and so bringing it within the rule of the law of the case under the judgment of the Court of Appeals, holding that the acts of the plaintiff in the premises did not constitute performance. But it is not by what plaintiff hoped to accomplish by his acts that the result is to be determined, but by the legal effect of what he did; and although plaintiff's course did not, as he evidently hoped, constitute in law a performance, this result cannot militate against his right to have those acts construed, if they are otherwise sufficient, as entitling him to maintain the alternative right to recover as for a breach. He had suffered a wrong through defendants' renunciation

of its contract, and finding that he could not change their attitude in that regard he determined to treat it as a breach and proceed in a manner that would enable him to have recompense for their default in one form or the other. In this there was no wrong to the defendants. It was but a precaution to protect himself from loss by reason of their refusal to carry out their contract. Nor do I think plaintiff's refusal at first to acquiesce in defendants' renunciation of the contract precluded him from his subsequent determination to do so. The contract was one which gave him a new right of action monthly, and he was entitled to change his course as to defendants' renunciation at any time before the contract was at an end as to all payments thereafter falling [82] due. I think, therefore, the facts entitle plaintiff to recover. The basis of recovery under this count I understand is not in dispute, but is to be taken, in the event of judgment for plaintiff, to be the difference between the compensation stipulated by the contract and the sums plaintiff received in the form of brokerage, all of which are fully set forth in the complaint.

As to the recovery sought under the first and fourth counts, respectively, I do not regard them as concluded by the law of the case. As to the first count, I think under the terms of the contract plaintiff's right of action was perfect at the end of the month, and his subsequent retention of a part of the premiums for that month could not affect that right. As to the fourth count, it is not dependent upon the contract, but is simply for money paid and laid out for the defendants under circumstances which

clearly entitle plaintiff to have it returned.

Judgment will accordingly go for plaintiff. Should the parties desire special findings, they may be had; and in that event the entry of judgment will await their filing. Should they not be desired, judgment will be entered in due course.

Thereafter and on said 25th day of September, 1914, pursuant to the order of Court, judgment was entered in said case in favor of the plaintiff, and against the defendants, for the sum of \$14,081.53, and for costs and disbursements incurred by the plaintiff in said action. [83]

Stipulation [for Allowance of Bill of Exceptions].

It is hereby stipulated and agreed that the foregoing Bill of Exceptions, having been regularly continued into the term of this Court commencing on the first Monday in November, to wit, the 2d day of November, 1914, was presented by the defendants within the time allowed by law therefor, and that the same is a true and correct copy of the proceedings had at the trial of the above-entitled action, and that the same may be certified, allowed and settled as provided by law and the practice of this court. Dated: February 25th, 1915.

GOODFELLOW, EELLS, MOORE & OR-
RICK,

Attorneys for Plaintiff.
OTTO IRVING WISE,
T. C. VAN NESS,
Attorneys for Defendants.

[Order Settling and Allowing Bill of Exceptions.]

I, the undersigned Judge of the District Court of the United States, Northern District of California, Second Division, who presided at the trial of the above-entitled action, and the settlement of the said Bill of Exceptions having been regularly continued into the term of this court commencing on the first Monday of November, 1914, to wit, on the 2d day of November, 1914, and said Bill of Exceptions having been presented by the defendants within the time allowed by law therefor, and having found the same to be true and correct, do hereby certify, settle and allow the same and order that it be filed with the clerk of said court.

Dated Feby. 25, 1915.

WM. C. VAN FLEET,
Judge. [84]

[Endorsed]: Filed Feb. 25, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [85]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, RO-
CHESTER GERMAN INSURANCE COM-
PANY, CALEDONIAN-AMERICAN IN-
SURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Petition for Writ of Error.

Caledonian Insurance Company, Rochester Ger-
man Insurance Company, Caledonian-American In-
surance and The Scottish Underwriters, the defend-
ants above named, feeling themselves aggrieved by
the decision of the above-entitled Court and the
judgment entered thereupon on the 25th day of
September, 1914, whereby it was adjudged that the
plaintiff have and recover from the defendants the
sum of Fourteen Thousand, and Eighty-one and
53/100 (\$14,081.53) Dollars, and his costs and dis-
bursements incurred in said action, and having
within the time allowed by law therefor petitioned
the above-entitled Court for a new trial and rehear-
ing in the above-entitled action, and said Court
having duly entertained said petition for a new trial
and rehearing, and the hearing of said petition hav-
ing been duly and regularly continued by said Court

for hearing to the 15th day of February, 1915, and the same having been on said 15th day of February, 1915, heard by and submitted to said Court for consideration and decision, and said Court having thereupon, on the 7th day of June, 1915, denied the said [86] petition for rehearing and a new trial herein, come now by T. C. Van Ness and Otto Irving Wise, as their attorneys, to petition said Court for an order allowing them to prosecute a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the supersedeas bond which the defendants shall give and furnish upon said writ of error, and that upon the giving of such bond all further proceedings in this court shall be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals.

And your petitioners will ever pray.

OTTO IRVING WISE,

T. C. VAN NESS,

Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]. Filed Jun. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, RO-
CHESTER GERMAN INSURANCE COM-
PANY, CALEDONIAN-AMERICAN IN-
SURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Assignment of Errors.

Come now the defendants above named and file the following assignment of errors upon which they, and each of them, will rely upon their prosecution of the writ of error in the above-entitled action:

1. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the defendants and plaintiffs in error to the original complaint filed in said cause of action.

2. That the said United States District Court, in and for the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the original complaint filed by the plaintiff in said action.

3. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the de-

fendants and plaintiffs in error to the amended complaint filed by plaintiff in said action.

4. That the said United States District Court, in and for [88] the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the amended complaint filed by plaintiff in said action.

5. That the said United States District Court, in and for the Northern District of California, erred in granting plaintiff and defendant in error leave to file his amended complaint in said action.

6. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

7. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error and in entering judgment in accordance therewith.

8. That the said United States District Court, in and for the Northern District of California, erred in rendering and entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

9. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

10. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of the plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision is against law.

11. That the said United States District Court, in and for [89] the Northern District of California, erred in rendering its decision and entering its judgment thereon in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision and judgment are against law.

12. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in said action in favor of the plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that the said judgment is against law.

13. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that the evidence is insufficient to justify said decision, and that upon the uncontradicted and uncontroverted evidence in said action the said Court should have rendered its decision in favor of the defendants and plaintiffs in error in said action and against the plaintiff and defendant in error.

14. That the said United States District Court, in and for the Northern District of California, erred

in rendering its decision and entering its judgment thereon in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that upon the uncontradicted evidence, and as to which there is and was no dispute, said Court should have rendered its decision in favor of the defendants and plaintiffs in error and against the plaintiff and defendant in error.

WHEREFORE, the said defendants and plaintiffs in error, and each of them, pray that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, be reversed, and that said cause may be remanded [90] to said United States District Court, in and for the Northern District of California, Second Division, with instructions to said Court to enter judgment for the defendants and plaintiffs in error.

T. C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Jun. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [91]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, RO-
CHESTER GERMAN INSURANCE COM-
PANY, CALEDONIAN-AMERICAN IN-
SURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

Order for Issuance of Writ of Error.

On motion of T. C. Van Ness and Otto Irving Wise, attorneys for defendants and plaintiffs in error, and upon the filing of a petition for a writ of error and an assignment of errors,

IT IS ORDERED that the writ of error, as prayed for in said petition, be allowed, and that the amount of the supersedeas bond to be given by said defendants and plaintiffs in error upon said writ of error be, and the same is hereby, fixed at the sum of seventeen thousand four hundred dollars, and that upon the giving of said bond all further proceedings in this court shall be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated June 25th, 1915.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Jun. 25, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [92]

[Bond.]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, RO-
CHESTER GERMAN INSURANCE COM-
PANY, CALEDONIAN-AMERICAN IN-
SURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

KNOW ALL MEN BY THESE PRESENTS:
That we, Caledonian Insurance Company, Rochester
German Insurance Company, Caledonian-American
Insurance Company and The Scottish Underwriters,
as principals, and National Surety Company of New
York (a corporation), as surety, are held and firmly
bound unto the plaintiff in the above-entitled action
in the sum of Seventeen Thousand Five Hundred
(\$17,500.00) Dollars, for which payment well and
truly to be made, we bind ourselves, and each of us
jointly and severally, our and each of our successors,
representatives and assigns, firmly by these pres-
ents.

Scaled with our seals and dated this 26th day of
June, 1915.

WHEREAS, the above-named defendants, Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, have sued out a writ of error in the United States District Court, in and for the Northern District of California, Second Division, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the defendants therein for the sum of Fourteen Thousand and Eighty-one 53/100 (\$14,081.53) Dollars, interests and costs; [93]

NOW, THEREFORE, the condition of this obligation is such that if the above-named Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters shall prosecute such writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ROCHESTER GERMAN INSURANCE
COMPANY,

By T. C. VAN NESS, Jr.

CALEDONIAN INSURANCE COMPANY,
CALEDONIAN-AMERICAN INSURANCE
COMPANY,

THE SCOTTISH UNDERWRITERS,

By A. C. OLDS,

Joint Mgr.

NATIONAL SURETY COMPANY,

By FRANK L. GILBERT,
Resident Vice-President.

[Seal]

By E. MAHONEY,
Resident Asst. Secretary.

This bond is approved.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Jun. 26, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [94]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for
the Northern District of California, Second
Division.*

No. 15,247.

S. W. LEVY,

Plaintiff,

vs.

CALEDONIAN INSURANCE COMPANY, RO-
CHESTER GERMAN INSURANCE COM-
PANY, CALEDONIAN-AMERICAN IN-
SURANCE COMPANY and THE SCOT-
TISH UNDERWRITERS,

Defendants.

I, Walter B. Maling, Clerk of the District
Court of the United States, for the Northern Dis-
trict of California, do hereby certify that the fore-
going ninety-four (94) pages, numbered from 1 to

94, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$52.20; that said amount was paid by the attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of August, A. D. 1915.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Cancelled
Aug. 4, 1915. J. A. S.] [95]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America,
To the Honorable, the Judges of the District
Court of the United States for the Northern
District of California. Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Caledonian Insurance Company, Rochester

German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, Plaintiffs in Error, and S. W. Levy, Defendant in Error, a manifest error hath happened, to the great damage of the said Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters, Plaintiffs in Error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE,
Chief Justice of the United States, the 26th day of

June, in the year of our Lord one thousand nine hundred and fifteen.

WALTER B. MALING,

Clerk of the United States District Court,
Northern District of California.

Allowed by

WM. C. VAN FLEET,

United States District Judge. [96]

Service of the foregoing Writ of Error, and receipt of a copy thereof, at the City and County of San Francisco, in the Northern District of California, is hereby admitted this 26th day of June, 1915.

GOODFELLOW, EELLS, MOORE & OR-
RICK,

Attorneys for Defendant in Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

_____,
Clerk.

[Endorsed]: No. 15,247. United States District Court for the Northern District of California. Caledonian Insurance Company et als., Plaintiffs in Error, vs. S. W. Levy, Defendant in Error. Writ

of Error. Filed Jun. 28, 1915. W. B. Maling, Clerk.
By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to S. W. Levy,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and The Scottish Underwriters are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 26th day of June, A. D. 1915.

WM. C. VAN FLEET,
United States District Judge. [97]

Service of the foregoing Citation on Writ of Error, and receipt of a copy thereof, at the City and County of San Francisco, in the Northern District of California, is hereby admitted this 26th day of June, 1915.

GOODFELLOW, EELLS, MOORE & OR-
RICK,

Attorneys for Defendant in Error.

[Endorsed]: No. 15,247. United States District Court for the Northern District of California. Caledonian Insurance Company et als., Plaintiffs in Error, vs. S. W. Levy, Defendant in Error. Citation on Writ of Error. Filed Jun. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2634. United States Circuit Court of Appeals for the Ninth Circuit. Caledonian Insurance Company, Rochester German Insurance Company, Caledonian-American Insurance Company and the Scottish Underwriters, Plaintiffs in Error, vs. S. . Levy, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed August 5, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CALEDONIAN INSURANCE COMPANY, etc., et
als.,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

**Order Extending Time to File Record on Writ of
Error and to Docket the Case.**

Good cause appearing therefor it is ordered that the plaintiffs in error may have to and including the 6th day of August, 1915, within which to file the record on writ of error and to docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 24, 1915.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. 2634. United States Circuit Court of Appeals for the Ninth Circuit. Caledonian Insurance Company, etc., et als., Plaintiffs in Error, vs. S. W. Levy, Defendant in Error. Order Extending Time to File Record on Writ of Error and to Docket the Case. Filed Jul. 24, 1915. F. D. Monckton, Clerk. Refiled Aug. 5, 1915. F. D. Monckton, Clerk.

No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY

et al.,

Plaintiffs in Error,

VS.

S. W. LEVY,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

T. C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Plaintiffs in Error.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY

et al.,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This is the second appeal by plaintiffs in error from the judgment of the United States District Court in favor of defendant in error, S. W. Levy. The cause was originally tried before a jury which brought in a verdict in favor of Levy and against the insurance companies for \$11,710.57. Upon that judgment a writ of error was obtained to this court. After a hearing, the judgment was reversed and the cause remanded for a new trial. The former appeal is reported in the case of Caledonian Insurance Company v. Levy, 199 Fed. 407. Upon a retrial in the District Court, the testimony taken at the first trial was made part of the record by stipulation

between counsel. No additional evidence of a material character was offered. The testimony given at the second trial was, therefore, identical with that at the first trial. For the purpose of advising the court as to the facts in this controversy, it is only necessary for us to repeat the statement made by us in our brief on the previous appeal.

On April 1, 1906, an agreement was made and entered into between plaintiffs in error, whom we shall call the companies, they being four foreign fire insurance companies, and defendant in error, S. W. Levy, whereby the latter was employed by the companies for a period of two years from that date. The agreement was in the form of a letter written by the companies to Levy, and provided, to quote the language of the contract itself,

“for and in consideration of the sum of \$1000 payable to you monthly, you agree to place in the companies represented in this office or through them any and all fire insurance business which you may be able to secure or control”, and it further states “that the consideration above expressed shall cover any and all compensation for services rendered by yourself and clerical service of your employees to the companies represented in this office and its management”.

This agreement was accepted by Levy. About two weeks after its acceptance, there occurred the great earthquake and conflagration which destroyed practically the entire business district of San Francisco. After this catastrophe, plaintiffs in error notified Levy that they had elected to rescind the

contract, upon the ground that the destruction of property in San Francisco upon which they claimed the great bulk of Mr. Levy's business was obtained, resulted in a failure of the consideration for the contract in material part. Levy, however, refused to consider the contract rescinded and so notified the companies. He stated that he would continue to perform the contract according to its terms and that he expected the payment of \$1000 monthly as provided in the contract. Thereafter, he continued to place all insurance procured by him, or through his office, with the companies. Every month he made a demand for the payment of the sum of \$1000, which was refused. After the expiration of several months, Levy commenced suit in the Superior Court of the State of California, to recover the salary then due him. This action was tried in April, 1907, and under a supplemental complaint filed at the time of the trial, he recovered a judgment for the first twelve months of the contract in the sum of \$12,000. An appeal was taken by the companies from this judgment to the Supreme Court of the State of California and the judgment of the trial court was affirmed.

Levy v. Caledonian, 156 Cal. 527.

In affirming the judgment in that case the Supreme Court held that plaintiff (Levy) had performed the contract during the first year ending April 1, 1907. After the decision of the Supreme Court in that action in 1909, the amount of the judgment, including interest and costs, was paid in

full by the companies. Prior to that time, Levy made a material change in the manner in which he conducted his business relations with the companies. Up to April 1, 1907, as has been previously stated, he placed with the companies all of the insurance which he was able to procure, and at the end of the month would demand the payment of the thousand dollars which he claimed was due. On the 27th day of April, 1907, instead of making demand for the money due him for the month of April, he wrote to the companies through his attorneys, (Transcript, page 69) to the effect that he would continue to perform his services under the contract until the end of the month, when he would make demand for the regular compensation. The letter then continues:

“If you still refuse payment and still persist in claiming that the contract has been rescinded he (Levy) will consider that you have committed a breach of the contract and will sue you once and for all for damages.”

To this letter, plaintiffs in error replied that if the courts ultimately determine that the destruction of the principal part of the City of San Francisco, by reason of which destruction Levy's ability to perform the contract between himself and the companies was destroyed, does not release the companies from their obligation under the contract, then Levy will be paid the sum of \$1000 per month, provided for in the contract, or if not, he would receive the usual brokerage of fifteen per cent of the premiums collected.

Despite the answer of plaintiffs in error, Levy in the month of May, 1907, commenced an action in the Superior Court of the State of California, to recover the entire balance which would thereafter become due under the contract, though it still had eleven months to run, and that at the time the action was commenced there was due to Levy only the sum of \$1000, exclusive of the amount recovered by him by judgment prior to that time, but which was not paid until its subsequent affirmance by the Supreme Court. The theory of that action, commenced in 1907, was that the companies' attempted rescission in 1906, amounted to a repudiation and that the failure of performance on the part of the companies was a valid excuse for non-performance on Levy's part. At the same time, and for each succeeding month until the end of the term of the contract, Levy deducted from the money which he paid to the companies for insurance procured by him or through his office, fifteen per cent of the premiums collected. That was the usual and regular brokerage commission prevailing at that time in San Francisco and that was the amount that any insurance broker would have and could have received from any company in San Francisco with which such broker placed his risks.

The present action was commenced after the expiration of the term provided for in the contract and subsequent to the dismissal of the action in the Superior Court last referred to. These facts as we have recited them, stand upon the record uncontra-

dicted. They cannot be disputed by defendant in error, for there is no doubt that they are absolutely correct. But despite the evidence, the trial court again gave its judgment in favor of Levy and against the insurance companies.

The record in this case presents the following specifications of error relied on by the companies for a reversal of the judgment:

1. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the defendants and plaintiffs in error to the original complaint filed in said cause of action.

2. That the said United States District Court, in and for the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the original complaint filed by the plaintiff in said action.

3. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the defendants and plaintiffs in error to the amended complaint filed by plaintiff in said action.

4. That the said United States District Court, in and for the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the amended complaint filed by plaintiff in said action.

5. That the said United States District Court, in and for the Northern District of California, erred in granting plaintiff and defendant in error leave to file his amended complaint in said action.

6. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

7. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error and in entering judgment in accordance therewith.

8. That the said United States District Court, in and for the Northern District of California, erred in rendering and entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

9. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

10. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of the plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision is against law.

11. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment therein in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision and judgment are against law.

12. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in said action in favor of the plaintiff and defend-

ant in error and against the defendants and plaintiffs in error in this, that the said judgment is against law.

13. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that the evidence is insufficient to justify said decision, and that upon the uncontradicted and uncontroverted evidence in said action the said court should have rendered its decision in favor of the defendants and plaintiffs in error in said action and against the plaintiff and defendant in error.

14. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment thereon in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that upon the uncontradicted evidence, and as to which there is and was no dispute, said court should have rendered its decision in favor of the defendants and plaintiffs in error and against the plaintiff and defendant in error.

In deciding the case, the court gave its reason for its decision (Trans. of Record, page 85 ff). This decision in part is as follows:

“The material question upon which judgment principally turns, is whether the cause of action stated in the second count of the complaint upon which plaintiff now relies is one ‘upon the contract’ that is based upon the theory of performance of the contract as contended by the defendant or is one to recover damages for the defendants’ breach in its repudiation of the contract as contended by plaintiff. * * *

If the latter, then the law of the case does not apply since the theory upon which plaintiff is now proceeding was not involved in the judgment of the appellate court. As to the main cause of action alleged, it is asserted in two forms, the one alleging and based upon the theory of the full performance of the contract, and a right to recover thereunder which was the count relied upon at the former trial; the other under which plaintiff now seeks recovery, alleging the facts fully as to what was done by the parties to the contract and seeking damages for its repudiation or breach by defendant. I am of the opinion that the latter count cannot be said in its legal aspects to 'count upon the contract' in the sense insisted by defendants, that is it does not proceed upon the theory of performance, but is to be regarded as stating a cause of action arising upon defendant's breach.

He (Levy) had suffered a wrong through defendant's renunciation of its contract and finding that he could not change their attitude in that regard, he determined to treat it as a breach and proceed in a manner that would enable him to have recompense for their default in one form or the other. In this there was no wrong to the defendants. It was but a precaution to protect himself from loss by reason of their refusal to carry out their contract nor do I think plaintiffs' refusal at first to acquiesce in defendants' renunciation of the contract precluded him from his subsequent determination to do so."

We must confess our inability to understand the distinction which the court makes between an action on the contract and one to recover damages for the breach thereof. It is our understanding of the law that every action "upon a contract" is an action

by one party to recover damages for the breach of the contract by the other contracting party. The only distinction which is recognized is that while in ordinary cases the party seeking to recover must show performance on his part and a failure to perform on the part of the other party, under certain circumstances it is unnecessary for the plaintiff to prove performance. Where the defendant has refused to perform, plaintiff need only show that by reason of some act of the former he was prevented from performing and such prevention may be pleaded as an excuse for non-performance. We assume that this is the distinction which the court seeks to draw between the theory upon which this case was originally tried and that relied upon by Mr. Levy at the second trial.

In a very recent case, *Hughes v. Chung Sun Tung Co.*, 21 Cal. App. Dec. 334, complaint was made by defendant that the court erred in permitting plaintiff to file an amended complaint upon the ground that by so doing the cause of action was changed. The court in holding such amendment proper, remarked:

“The gravamen of the action is the breach of the contract, and the averment of such breach in one form or the other would not amount to a change in the nature of the action.”

It seems only proper to remark at this point that upon the former appeal—all of the facts being before the court—the judgment would not have been reversed had the evidence been sufficient to support

the judgment on any theory. By its decision, this court has held that under the evidence introduced at the first trial, Levy was precluded from recovering upon the contract between himself and plaintiffs in error. In the absence of any new or additional facts at the subsequent trial, we submit that Levy's right to recover is barred by the law of the case.

But we firmly are of the opinion that the evidence will not support a recovery in any event or upon any theory. The contract between the parties to this action provided that Levy was to place all business which he, as an insurance broker, was able to obtain with the defendant companies for a period of two years and that at the expiration of each month he was to be entitled to the sum of \$1,000, as full compensation for such service. This money was not paid monthly to Levy for the reason that defendants, shortly after the execution of the contract, claimed that the consideration therefor had failed in material part due to the destruction by fire of the business district of San Francisco in April, 1906. This position was maintained by the companies through a long litigation which was not finally determined until after the expiration of the time for the full performance of the contract. The companies never at any time refused to accept any business which Mr. Levy tendered them. On the contrary, they accepted all such business and merely stated that they would not pay the sum of \$1,000 per month for such business until such time as the courts might determine that the contract was still

in full force and effect. For a period of one year, Levy accepted this situation and continued to perform the contract. At the expiration of the year he notified the company that he would not continue to perform unless the sum of \$1,000 per month was paid him, and thereupon he actually deducted from the premiums collected by him the sum of 15% thereof, being the regular and usual brokerage commission paid by insurance companies to insurance solicitors bringing business to them. This fact, the court held upon the former appeal, constituted a failure on the part of Levy to perform the contract. It is too elementary to require any citation of authority to support the proposition that a party seeking to recover damages for a breach of a contract must show performance on his part or an excuse for non-performance. Plaintiff having admittedly failed to perform the contract, the only remaining question is, was he excused from performing by reason of any act or omission on the part of the companies. The evidence shows only one act of omission, namely, their refusal to pay the sum of \$1,000 per month when the same became due.

Sections 1511 and 1512 of the Civil Code of the State of California provide that a debtor is entitled to all of the benefits which he would have obtained if the contract had been performed by both parties if the performance of the obligation is prevented by the creditor. Want of performance is excused when performance is prevented or delayed by the act of the creditor or where the debtor is induced

not to make it by any act of the creditor intended or naturally tending to have that effect done at or before the time at which such performance or offer may be made. The only act which Levy contends constituted prevention of performance on his part was the failure to pay the sum of \$1,000 per month. This duty was a condition subsequent to the performance on the part of the plaintiff and no obligation to pay any compensation arose until the expiration of the month in which the services of Levy were to be rendered to the companies. By its decision on the first appeal, this court held that the retention of 15% brokerage by Levy, constituted a breach of the contract on his part. It has also been directly held in *Cox v. McLaughlin*, 54 Cal. 605, that the failure to pay the money stipulated for in the contract does not constitute a prevention of performance, but prevention of performance means that one of the contracting parties (where work is to be performed) prevents or prohibits the completion of the work—the contractor being ready and willing to complete the work. Similarly, in *Palm v. Ohio etc. Railroad Co.*, 18 Ill. Rep. 219, the court denied the right of plaintiff to recover the losses sustained by not being permitted to complete the contract

“unless he has been prevented from going on with his work by the positive or affirmative act of the other parties or where the other party has neglected to do some act without which the plaintiff could not, in the nature of things, go on with his contract as where he refuses to furnish a place whereon to erect a building or to furnish material which by contract was to be put in the works.”

From this it follows that the companies committed no breach of any of the terms of the contract on their part to be performed, but that Levy did not perform on his part. Nor was he prevented from performing by any act of the companies, but his failure to perform was due to his own act in retaining the commission. We therefore urge that it matters not whether the action is "on the contract" or "is one to recover damages for defendants' breach", there is no evidence to support the judgment of the trial court.

Reliance is placed by Levy upon the proposition that as the companies notified him (wrongfully as it later appeared from the decision of the Supreme Court of the State of California) that they rescinded the contract and stated that their obligation to continue thereunder had ceased, that he at any time thereafter might elect to consider such attempted rescission as a repudiation and thereupon sue for the entire amount due under the contract. We may concede for the purpose of this discussion that Levy might have considered the attempted rescission of the companies as a termination of a contract and have elected to consider such attempted rescission as an anticipatory breach thereof but the fact is that he did not so treat it, but despite the attempt on the part of the companies to rescind, Levy continued for a period of almost a year thereafter to perform the contract and by his insistence that the contract was still in full force and effect, his right to recover can only be measured by the terms

of the contract itself. This point was decided in *Tatum v. Ackerman*, 148 Cal. 357, where the court said

“an attempted rescission of the contract in toto by the vendee is no waiver of the single stipulation as to credit. The plaintiffs refused to acquiesce in such rescission and insisted that the contract should be enforced according to its terms, which they had the right to do, but they had no right to make a new contract for the defendant. If against the will of the vendee, the contract is to stand, the vendee may still insist that it shall stand according to its terms.”

II.

The theory upon which counsel for defendant in error proceeded at the second trial is that Levy at the expiration of the first year of the contract treated the rescission by the companies of the year previous as a renunciation and elected to consider the contract terminated and to sue once and for all for damages. But upon the record Levy is clearly estopped from making this contention.

The evidence discloses that the contract between the parties was executed March 31, 1906, to commence the following day. The attempted rescission by the companies occurred in June, 1906. It is undisputed that Levy performed the contract on his part at all times up to April, 1907. It further appears from the record that he was ultimately paid the sum of \$1,000 per month for all the first year period by the companies. In April, 1907, ap-

proximately a year after the attempted rescission by the companies, Levy notified them of his intention to sue once and for all for damages in the event the companies continued to refuse payment of the sum of \$1,000 per month. But this he could not do. It was his duty in the event that he desired to consider the rescission by the companies as a termination of the contract to immediately elect to terminate it. For a period of one year after the attempted rescission he refused to consider the contract terminated. This precluded him from doing so in April, 1907. He could not proceed upon the theory that the attempted rescission by defendants was not binding upon him, but at the same time in full force in his favor; that the contract was at all times in force, but that he might at the same time treat the action of defendants as a renunciation upon which he might at his pleasure and without performance on his part sue for damages. He was bound to elect which course he would pursue, and having elected, as he did, to go ahead under the contract, he cannot now be permitted to recover damages as for a breach.

The leading case upon this subject is *Johnstone v. Milling*, 16 Q. B. R. 467, where it is said:

“A renunciation of a contract, or in other words, a total refusal to perform it by one party before the time for performance arrives, does not by itself amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract,

that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party if he pleases to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation: if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course, a cause of action on the contract would arise. He must elect which course he will pursue."

In *Bingley v. Oler*, 117 U. S. 503, the Supreme Court says:

"In *Smoot's case*, 15 Wall. 36, 'and that case discusses the question somewhat more fully', this court quoted with approval the qualifications stated by Benjamin on Sales, 1st Ed., 424, 2d Ed. Sec. 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; *it must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and*

acted upon as such by the party to whom the promise was made; for, if he afterwards continue to or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

In *Hansen v. Salven*, 98 Cal. 377 (383) the Supreme Court of California, passing upon the question as to what refusal upon the part of defendant to perform will justify the other party in not performing as a condition precedent says:

"The authorities all agree that in order to constitute an implied waiver of an offer or tender" (of performance) "the refusal must be explicit and positive."

But even if this court should be of the opinion that Levy could have elected to terminate the contract upon the attempted rescission by the companies a year after notice thereof was given him, notwithstanding his election to proceed under the contract during that year, the evidence plainly shows that Levy never did *at any time* treat the attempted rescission as a termination of the contract. On the contrary, the testimony of Levy himself and of his employee, Wren, is to the effect that at all times during the life of the contract, Levy attempted to perform. That is best proved by the fact that at the first trial of this action his attorneys proceeded upon the theory of performance by Levy, and throughout the trial and the previous appeal insisted that the evidence showed performance on his part. If any further evidence is necessary to show that Levy at all times was dealing with the

contract as in force and attempted to perform during the second year is shown by the following acts on his part:

(1) He placed all of the business which he was able to secure with the companies in this action (Trans. page 69).

(2) In cases where they were unable to accept the risk he placed the business with other companies and gave credit therefor to plaintiffs in error (Trans. page 69).

(3) He, or his employees, made monthly demand for the payment of \$1,000 per month. The deduction of 15% of the gross premiums which he made he explained at the trial to have been made for office expenses (Trans. pages 70-71).

If Levy had elected to consider the contract terminated none of these things would have been done. It was his duty if he desired to consider the repudiation of the companies as a termination of the contract to immediately act upon it as such, and the authorities which we have cited upon this point make it clear that he could not, after the expiration of one year, during the whole of which time he had proceeded under the contract, consider such rescission as a repudiation; and it is equally clear that after sending the letter to the companies advising them that he intended to sue once and for all for damages in the event that the \$1,000 per month was not paid he abandoned that position and proceeded upon the theory that the contract was still in force.

Under these circumstances, in order to recover it was necessary that he should prove that he continued to perform during the whole of the second year. This court has already held under the same statement of facts that the record now discloses that he did not actually perform during the second year for the reason that he retained 15% brokerage fees. We respectfully submit therefore that under the law of the case as settled by this court upon our previous appeal that there is no justification for the decision of the trial court in his favor, and that the judgment from which we are now appealing should be reversed with direction to enter final judgment in favor of plaintiffs in error.

III.

The judgment in favor of Levy and against the companies was for \$14,081.53. This amount was computed by allowing Levy \$1,000 per month during the last eleven-month period of the contract between himself and the companies with interest from the date that each installment of \$1,000 would have become due under the contract. This amount plaintiffs in error claim is excessive and is not the proper measure of damage. The contract of employment provided for the payment of \$1,000 per month as full compensation for all services to be rendered by Levy. The agreement further provided that Levy

“shall employ Melville S. Levy, whose services during usual business hours shall be given to the companies represented in this office when not otherwise engaged on (plaintiff’s) business; that the consideration above expressed shall cover any and all compensation for services rendered by (Levy) and clerical services of (his employees) to the companies represented in this office and its management.”

The theory upon which the trial court decided in favor of Levy was that performance on his part was excused by reason of the repudiation of the contract by companies and the court distinctly held that Levy did not perform the contract. It was because Levy did not perform the contract that the case was originally reversed by this court. Inasmuch as performance of the contract on his part required the disbursement of his office expenses and the salary of M. S. Levy, even if the trial court were correct in holding that plaintiff was entitled to recover, from the amount to which he was entitled must be deducted these expenses. The judgment given upon the second trial was therefore in excess of the amount which Levy would have been entitled to had the contract been fully performed on his part and is therefore excessive.

IV.

Under the specification that the trial court erred in overruling the demurrer of defendants and plain-

tiffs in error to the complaint in this action, we direct the attention of this court to the fact that the complaint does not allege either performance or non-performance of the contract on the part of Levy. The trial court in deciding this case, interpreted the complaint as follows (Trans. page 87):

“It is asserted in two forms, the one alleging and based upon the theory of the full performance of the contract and the right to recover thereunder, which was the count relied upon at the former trial; the other under which plaintiff now seeks to recover alleging the facts fully as to what was done by the parties to the contract and seeking damages for its revocation or breach by defendant.”

This is the very situation which our courts have uniformly condemned. It has been stated:

“Every complaint should be founded upon a theory under which the plaintiff is entitled to recover and should state all the facts essential to support such theory. Failing in these respects, it is radically defective and does not state facts sufficient to constitute a cause of action.”

Buena Vista Fruit & Vineyard Co. v. Tuohy,
107 Cal. 243.

It is also the duty of plaintiff in an action where he pleads both performance and non-performance to elect at the trial upon which theory he intends to proceed and thereupon he is bound by such election. At the first trial of this action, Levy elected to rely upon the theory of performance. This court on appeal held that he had not performed the contract

on his part. We respectfully submit that he cannot, now, change his theory and elect to proceed upon the ground that he was prevented from performing by any act of the companies.

It is unnecessary to consider any other specification of error, as we feel confident that this court will, upon the facts heretofore presented, order the judgment reversed with directions to the trial court to enter judgment in favor of defendants. There was no new evidence introduced at the second trial of the action; there was no amendment to the pleadings in the case, therefore the law of the case as decided by this court on the prior appeal must apply. This court having determined on the evidence now before it, that plaintiff is not entitled to recover, we respectfully submit that the judgment in this case should be reversed.

Dated, San Francisco,
October 27, 1915.

T. C. VAN NESS,
OTTO IRVING WISE,
Attorneys for Plaintiffs in Error.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

CALEDONIAN INSURANCE COMPANY
et al.,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

Brief for Defendant in Error

GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for Defendant in Error.

Filed this 11th day of November, 1915.

NOV 6 - 1915

FRANK D. MONCKTON, *Clerk.*

By *Deputy Clerk.*



INDEX

	PAGE
I. Statement of Facts	5
II. Neither the facts nor the conclusions of law upon which the judgment is based are reviewable for:	
(a) The case was tried by the Court without a jury under stipulation of the parties, and no special findings were made by the Court or requested by the parties	10
(b) The record contains no ruling, decision or order made during the progress of the trial, and no assignment of error in respect thereto.....	11
III. The assignments of error in respect of the pleadings should be overruled	11
IV. Assuming, solely for the purposes of argument, that the facts and conclusions of law upon which the court below based its general finding in favor of plaintiff are open to review upon this appeal, such general find- ing was proper, and the only one which the evidence warranted	20
1. The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover upon the ground of defendants' repudiation of the contract during the last eleven months of the contract	21
2. The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover his salary for the month of April, 1907.....	32
3. The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover the amount paid out by him representing com- missions on unearned premiums.....	37
V. Answer to argument and authorities of plaintiff in error	37

No. 2634.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CALEDONIAN INSURANCE COMPANY
et al.,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This case is brought here upon a record which shows that it was tried by the Court without a jury under stipulation of the parties; that no special findings were made by the court or requested by either party; that in the progress of the trial no objection or motion was made by the plaintiffs in error, and no ruling, decision or order (other than the order for judgment) was made by the court; and that no exception of any kind was taken by the plaintiffs in error. There is, therefore, nothing presented for review upon this appeal, as we shall presently point out, excepting the order of the

court below overruling the demurrer to the complaint. Under the well settled rule, neither the facts nor the conclusions of law upon which the general finding of the court below in favor of the defendant in error rests, are open for consideration.

It will be conducive to a clear understanding of the case, if, at the outset, the nature of the issues which were involved upon the first trial, and the decision of this court upon the first appeal, be considered. The plaintiffs' claim (for purposes of convenience the defendant in error will be designated herein as the plaintiff, and the plaintiffs in error as the defendants) is set forth in the complaint in four separate counts. The first states a cause of action to recover plaintiff's salary for the month of April, 1907, based upon the claim that during that month he duly performed the contract on his part. (Tr., pp. 1-10.) In the second count, it is alleged that at the end of April, 1907, and during each of the remaining eleven months of the term of the contract, defendants repudiated the contract, and unliquidated damages in the sum of \$11,000 for such repudiation are prayed. (Tr., pp. 10-13.) The theory upon which the third cause of action is based, is that the plaintiff duly performed the contract on his part during the last eleven months of the term thereof. (Tr., pp. 13-15.) The fourth count alleges the payment by plaintiff, at the instance and request of the defendants, of the sum of \$237.45, representing commissions upon certain return

premiums, and prays for judgment against the defendants in that amount. (Tr., pp. 15-17.)

It will be noted from what has been said that the second and third counts—though proceeding upon theories which are entirely distinct—relate to and cover the same period of time, i. e. the eleven months elapsing from the end of April, 1907, to the end of the term of the contract (March 31st, 1908). They are, however, inconsistent, since the second count states a cause of action for the *repudiation* of the contract by the defendants at the end of April, 1907, and during each of the remaining months of the term of the contract, and prays for unliquidated damages therefor, while the third count proceeds upon the theory of *performance* of the contract during that period by the plaintiff, and alleges as the breach that defendants failed to pay the agreed compensation. This course of pleading the same cause of action in different and inconsistent counts—it may be stated parenthetically—was proper under the authorities, and plaintiff could not have been required to elect upon which count he would proceed, but he was entitled to have the case submitted upon both theories.

Rucker v. Hall, 105 Cal. 429.

Stockton, etc., Works v. Glenn Falls Insurance Co., 121 Cal. 171.

Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. . 749, 752.

At the first trial, however, the case was submitted to the jury upon the theory of performance only, and not upon the theory of repudiation, the court charging the

jury at the request of defendants that the plaintiff had "elected to rely upon his performance." (199 Fed. 410.) "The case," this Court said in its opinion upon the former appeal, "was tried upon the theory that Levy "performed his part of the contract, covering the second year as well as the first." (199 Fed. 411.) In other words, at the first trial, the second count—which is the count wherein it is sought to recover unliquidated damages for defendants' repudiation of the contract—was not involved.

The jury found in favor of the plaintiff, and judgment was accordingly entered in his favor. This judgment was reversed by this court upon the ground that plaintiff having retained since the month of June, 1907, fifteen per cent. of the amount of premiums collected by him to cover office expenses, failed to perform the contract during the period such retention continued. Appreciating that this decision established the "law of the case" against plaintiff's theory set forth in the third count, at the last trial plaintiff's counsel disclaimed the right to recover under that count, and proceeded under the first, second and fourth counts of the complaint. (Tr., fol. 66.) The issues, therefore, at the first trial and the matters determined by this court upon the former appeal were entirely different from those which were involved upon the last trial; and the "law of the case," as established on the former appeal, does not affect any position of plaintiff at the last trial, or upon this appeal. On the contrary, the decision upon the first appeal tends merely (as we shall presently point

out) to confirm the correctness of the conclusion of the learned judge of the court below, respecting plaintiff's right to recover upon the present theory. We may add, also, in this connection—in view of defendants' contention that by relying at the first trial upon one of the inconsistent counts, plaintiff is precluded from now relying upon the other—that the authorities are otherwise.

Agar v. Winslow, 123 Cal. 590;

Brown v. Fletcher, 182 Fed. 973 (C. C. A. 6th Cir.).

At the last trial, the cause was submitted to the court without a jury upon the evidence taken at the first trial, supplemented by additional evidence offered by plaintiff. Notwithstanding we think it clear, as already suggested, that the state of the record precludes any inquiry into either the facts or the conclusions of law upon which the general finding in plaintiff's favor rests, we shall, without waiving our claim in that regard, briefly refer to the facts as established in the pleadings and by the evidence introduced at the trial.

I.

FACTS.

On March 31, 1906, the parties entered into the contract set forth in the fourth paragraph of the complaint. (Tr., pp. 2, 3.) This contract, by its terms, was to remain in force during the period of two years commencing with the first day of April, 1906. In June, 1906, the

defendant companies took the position that the consideration for the agreement had failed in a material part because of the earthquake; and on June 21, 1906, they announced to Levy in a letter that the contract was rescinded (Tr., p. 83). Levy did not assent to the rescission of the contract, and during the entire first year thereof he performed it on his part in every particular. At the end of each month during the first year, demand was made upon the defendant for the one thousand dollars due for that month. (Tr., p. 82.) Mr. Conroy, defendants' manager, testified that his reply was: "We could not pay it; the contract was rescinded." (Tr., p. 82.)

During the first year of the contract, actions were commenced by Levy in the Superior Court to recover his salary for the several months making up that year. These cases were pending during the entire second year of the contract, the decision of the Supreme Court affirming the judgment of the Superior Court in Levy's favor not having been rendered until November, 1909. At all times during the pendency of these actions, the defendants steadfastly maintained their old position with respect to the contract, "claiming and asserting," as alleged in paragraph VIII of the complaint and not denied in the answer, "that the said agreement was no longer in force or effect and that they would not perform on their part, any of the obligations thereof." (Tr., p. 5.) That this was the position of the companies during the entire second year of the contract clearly appears, also, from the statement of defendants' counsel,

made in reply to the question of plaintiff's counsel as to whether, in April, 1907, it was his position and that of the defendant companies that the contract had been rescinded and did not bind the latter. Mr. Van Ness, in this connection, said: "That has always been my position and I so advised the companies and they proceeded on that advice by reason of the destruction of San Francisco the law gave us the right to rescind the contract." (Tr., p. 84.)

On April 27, 1907, during the pendency of the litigation in the Superior Court, and while the defendants were still making their claim that the contract was not binding upon them, plaintiff, by his counsel, wrote defendants a letter in which it was stated that "if they still refused payment, and still persisted in claiming that the said contract had been rescinded, he would consider that they had committed a breach of the contract and would sue them once and for all for damages." (Tr., p. 78.) Defendants replied under date of April 29th, stating in effect that they would continue to maintain their old position and would accept the views of their own counsel and seek the legal determination of the matters in dispute; and that if the courts should *ultimately* determine that the destruction of the principal part of San Francisco, by reason of which destruction the plaintiff's ability to perform the contract between himself and the companies was destroyed, did not release the companies from their obligation under that contract, then plaintiff will be paid the one thousand dollars per month which he is *now*

seeking to recover." (Complaint, paragraph XVI.) The legal determination spoken of in the letter could not have been had until after the contract would have expired. (Tr., p. 68.) In the following month (May, 1907), plaintiff, acting upon this announcement of the defendants' position, commenced his action in the Superior Court to recover \$24,000 as unliquidated damages on account of defendants' repudiation of the contract. Upon the dismissal of that action, he commenced this action, wherein, as already stated, he again asserted his right to recover because of defendants' repudiation of the contract. Both the evidence and the admissions made in the pleadings establish beyond question that defendants at all times after June, 1906, and until the end of the term of the contract, continued to repudiate the contract—not merely, as suggested in the brief of plaintiffs in error, by failing to pay the agreed compensation, but by repeatedly claiming and asserting, during the entire period, that it had been rescinded and was not in force, and that they would not be bound thereby. (Complaint, para. VIII, Tr., p. 5; Complaint, para. XVI, Tr., p. 11; Complaint, para. XI, Tr., p. 8; Tr., pp. 83, 84.)

During the second year of the contract, the plaintiff placed in Mr. Conroy's office all of the insurance he was able to secure, and in April, as in the previous year, he remitted to defendants all of the premiums collected by him without deduction. In June, 1907, however, he commenced, for the first time, to deduct 15 per cent thereof to cover office expenses, and he continued this

practice at all times thereafter until the end of the term of the contract. The effect was, as held by this Court upon the former appeal (199 Fed. 407),—and this is now the “law of the case”—that he did not perform the contract during the period this practice continued. The deduction made in June included the premiums upon policies issued in April. Mr. Conroy, however, testified at the last hearing of the case, that premiums were not due until between forty-five and sixty days after the issuance of the policy. (Tr., p. 82.)

It thus appears that plaintiff's breach, if any, as it affected the claim for April salary, occurred *after* the April salary became due under the terms of the contract. No claim is made that plaintiff did not fully perform everything required to be performed by him up to the end of April, 1907.

We pass, now, to a consideration of the nature of the questions which may be reviewed upon this appeal. As already stated, we think it clear that the sole matter open for review concerns the sufficiency of the complaint.

II.

NEITHER THE FACTS NOR THE CONCLUSIONS OF LAW UPON WHICH THE JUDGMENT IS BASED ARE REVIEWABLE, FOR:

(1) THE CASE WAS TRIED BY THE COURT WITHOUT A JURY, UNDER STIPULATION OF THE PARTIES, AND NO SPECIAL FINDINGS WERE MADE BY THE COURT;

(2) THE RECORD CONTAINS NO RULING, DECISION OR ORDER MADE DURING THE PROGRESS OF THE TRIAL, AND NO ASSIGNMENT OF ERROR IN RESPECT THERETO.

Each of these propositions will be considered briefly in the order stated.

(1) *The case was tried by the court without a jury, under stipulation of the parties, and no special findings were made by the court.*

That under these circumstances the general finding in favor of plaintiff is not open to review, is thoroughly well established by the authorities. In some particulars, the evidence in the case at bar is conflicting. But even if it were not, it is well settled that the rule above referred to would be applicable. As said by Mr. Justice Brewer in *Lehner v. Dickson*, 148 U. S. 77, "The burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony."

Boardman v. Toffey, 117 U. S. 271;

Martinoon v. Fairbanks, 112 U. S. 670;

Humphreys v. Third National Bank, 75 Fed. 855; C. C. A. 6th (Taft, J.);

Kentucky, etc., Co. v. Hamilton, 63 Fed. 93; C. C. A. 6th (Lurton, J.);

Distilling Co. v. Gottschalk Co., 66 Fed. 609, 610; (C. C. A. 7th Cir.);

White v. Chase, (C. C. A. 8th), 201 Fed. 896; (C. C. A. 8th Cir.);

National Surety Co. v. U. S., 200 Fed. 142; (C. C. A. 8th Cir.).

(2) *The record contains no ruling, decision or order made in the progress of the trial, and no assignment of error in respect thereto.*

We invite the attention of the court, in this connection, to the assignments. (Tr., pp. 94-97.) The first five concern questions of pleading merely. No consideration, therefore, need be given them in this connection. Assignments 6 to 14 inclusive, are all in substantially the same form. None of them are predicated upon any ruling, decision or order made by the court; and all, we submit, are of such general character—stating as they do, merely that “the court erred in rendering its decision in favor of plaintiff, etc.”—that they raise no questions which are reviewable on this appeal.

Rule 11 U. S. Circuit Court of Appeals, Ninth Circuit;

National Surety Co. v. U. S., 200 U. S. 142; (C. C. A. 8th);

Chicago, etc., Co. v. Bomberger, 130 Fed. 884; (C. C. A. 7th). (“That verdict was contrary to law.”)

Ireton v. Pennsylvania Co., 185 Fed. 84, 86; (C. C. A. 5th).

III.

THE ASSIGNMENTS OF ERROR IN RESPECT TO THE PLEADINGS SHOULD BE OVERRULED.

We have shown that the record neither discloses any ruling, order or decision at the trial, nor any assignment

in respect thereof, and that the only rulings and assignments which are open to review upon this record are those in relation to the pleadings. The assignments in this connection are:

1. That the court erred in overruling the demurrer to the original complaint. (Tr., p. 94) ;
2. That the court erred in denying the motion of defendants to strike out portions of the original complaint. (Tr., p. 94) ;
3. That the court erred in overruling the demurrer to the amended complaint. (Tr., p. 94) ;
4. That the court erred in denying the motion of defendants to strike out portions of the amended complaint. (Tr., p. 95) ;
5. That the court erred in granting plaintiff leave to file his amended complaint. (Tr., p. 95.)

In view of the fact that the brief of plaintiffs in error contains little more than a passing reference to these assignments, we think we should be justified in passing them by without argument. We shall, however, endeavor briefly to point out why we believe each assignment is untenable and should be overruled.

Assignments 3 and 4 may be summarily disposed of by the statement that the record shows that no demurrer or motion was interposed to the complaint as amended. Assignment 5 may likewise be shortly disposed of, since the record shows no objection or exception by defendants to the order granting leave to file the amendment to the complaint, and no error in respect thereof.

Neither is any consideration of assignment 2 required for the reason that the record fails to show what portions of the complaint defendants sought to strike out, or that the court committed any error in denying their motion in that regard, or that any exception was taken by defendants to such ruling.

With these eliminations, there remains for consideration only the question whether the court erred in overruling the demurrer to the complaint. The record shows that after the demurrer was interposed by the defendants, the complaint was amended and that no demurrer to the amended complaint was interposed by defendants. This circumstance, of itself, would seem to render unnecessary any consideration of the questions arising out of the order of the court upon the demurrer to the original complaint.

Passing this consideration, however, it is apparent that the court did not err in overruling the demurrer. Each of the counts of the complaint is attacked by general demurrer only; while the complaint, as a whole, is attacked both by general demurrer and upon the ground of an alleged uncertainty based upon the fact that in the second count an amount is asked as damages for the defendants' repudiation of the contract, which is different from the amount prayed for in the third count. The demurrer to each of the counts will be first considered, and afterwards, the demurrer to the complaint as a whole.

As to the first count. In this count, as already stated, plaintiff claims to recover one thousand dollars as salary

for the month of April, 1907, it being alleged that he duly performed, etc. (Tr., par. 15, p. 9.) That this count adequately sets forth a cause of action seems so clear that we submit the matter without further discussion or citation of authority.

As to the second count. In this count, plaintiff seeks to recover the sum of eleven thousand dollars as unliquidated damages on account of defendants' repudiation of the contract at the end of April, 1907, which was persisted in during each month thereafter until the end of the term of the contract.

The principle of law upon which this count is based, and upon which we claim we are entitled to recover, is that when two persons have entered into a contract involving reciprocal obligations to be performed at a future time, and one of the parties repudiates the contract and gives notice that he will not be bound thereby, nor perform the same on his part, the other is entitled, if he pleases, to treat the repudiation as a final and total breach of the contract and to commence an action for unliquidated damages.

Civil Code, section 1440;

Hale v. Troutt, 35 Cal. 229;

Scribner v. Schenkel, 128 Cal. 250, 253;

Pierce v. Lukens, 144 Cal. 397, 400, 401;

Flynn v. Mowry, 131 Cal. 481, 486;

Remy v. Olds, 88 Cal. 537;

Howard v. Daley, 61 N. Y. 285;

Nichols v. Scranton, 137 N. Y. 471; 33 N. E. 564; per Peckham, J.;

Pierce v. Tennessee, 173 U. S. 1, 12; per Gray, J.;

Parker v. Russell, 133 Mass. 74;

Marks v. Reghan, 85 Fed. 853, per Wallace, J.;

In re Silverman, 101 Fed. 221;

Lakeshore, etc., Co. v. Richards, (Ill.) 30 L. R. A. 50.

It is quite true that defendants alone could not by repudiation of the contract put an end to it. The termination of the contract could only be effected by both parties—as it is said in the decisions—by the plaintiff *adopting* the renunciation,—and he could elect to adopt it or not, as he chose. The repudiation first occurred in June, 1906. It was persisted in by month by month, until the Supreme Court decided against the defendants in December, 1909, nearly two years after the term of the contract had expired. (Tr., pp. 12, 5, 6, 8.)

Mr. Levy did not adopt the renunciation of the defendants in June, 1906, nor until near the end of April, 1907, at which time he gave them notice of his intention to adopt their repudiation if persisted in. (Tr., pp. 77, 78.) They replied, in effect, that they would maintain the position which they had taken until the courts should *ultimately* hold that it was untenable; that they would accept the views of their own counsel, and would “seek the legal determination of the question in dispute.” (Tr., p. 11.) Such determination, it is shown by the record, could not have been had until after the expiration of the term of the contract. (Tr., p. 12.) In their letter, the defendants added that “if the courts “should *ultimately* determine that the destruction of the

“ greater part of the City of San Francisco, by reason of
 “ which destruction plaintiff’s ability to perform the
 “ contract between himself and the companies was de-
 “ stroyed, does not release the companies under that
 “ contract, then the plaintiff will be paid the \$1,000 per
 “ month which he is *now* seeking to recover,” referring
 undoubtedly to the action then pending covering plain-
 tiff’s salary for the first year. (Tr., p. 11.)

The complaint further alleges that the defendants at all times after April, 1907, “persisted in claiming and asserting that the said contract had been rescinded and was no longer in force or effect, and at all times continued to repudiate the same on their part and refused to be bound thereby, etc.” (Tr., p. 12, para. XVII); that “at all times until the decision of the Supreme Court of the State of California hereinafter referred to, the defendants persisted in claiming and asserting that the said agreement was no longer in force or effect, and that they would not perform on their part any of the obligations thereof and wholly repudiated the said agreement and refused to be bound thereby, and failed to perform the same in whole or in part (Tr., p. 5, para. VIII); that such repudiation was repeated in the answers filed by defendants in the litigation in the Superior Court (Tr., p. 6, para. IX), and that defendants also “in briefs filed in the said Superior Court and in a petition for rehearing after judgment had been rendered therein, claimed and asserted, as claimed by them in their answer in the said Superior Court, that the said agreement was no longer binding upon them and that the same had been rescinded.” (Tr., p. 8, para. XI.)

Accordingly, in May, 1907, Mr. Levy commenced his suit as for a total breach and renunciation of the contract, and for all damages accrued and to accrue. (Tr., p. 12.) This was an adoption by plaintiff, in May, 1907, in conformity with his letter, of the defendants' repudiation then still persisted in and reaffirmed by their letter of April 29, 1907.

It is suggested in the brief of plaintiffs in error—rather than argued—that Levy, not having adopted the repudiation in June, 1906, could not do so in May, 1907. But there was a continuing renunciation each month, and a continuing refusal to pay his salary each month, and it would seem plain that as he had a remedy each month he could select any the law allowed. He could, in May, 1907, for the first time, cease to treat their renunciation as *brutum fulmen* (L. R. 16 Q. B. D. 473), and then treat it as serious, and consider the defendants guilty of a final breach.

Canada, etc., Co. v. Flanders, 165 Fed. 321.

We submit, therefore, that the second count states a cause of action to recover unliquidated damages sustained by plaintiff by reason of defendants' repudiation of the contract. The only argument in reference to the sufficiency of the complaint which is advanced in the brief for plaintiffs in error, may be found on page 22 of their brief, where it is stated that the "complaint does not allege either performance or non-performance of the contract on the part of Levy." This argument, it is clear, ignores the fact that the doctrine of repudiation is entirely distinct from the doctrine of prevention of per-

formance. A repudiation will give rights to a cause of action before performance is due, and therefore before it could have been prevented. For that reason the notice that the "party will not perform the contract on his part" (C. C. Sec. 1440) need not be accompanied by any prevention of performance. See *Hochester v. de la Tour*, 22 L. J. Q. B. 455, and other English cases, on the subject.

It is true that in some of the cases the distinction which has been adverted to has not been kept in mind, and repudiation has been spoken of as involving a prevention of performance. The sense in which this term is used in these authorities is shown in the well considered case of *Lakeshore Ry. Co. v. Richards*, 152 Ill. 590; 30 L. R. A. 33, from which we quote the following:

"Stress is laid by counsel upon the words 'prevented from going on' . . . *The same language . . . i. e. that the suing must be prevented from performance has been used in numerous cases, but whether the attention of the Court has been directly called to the sense in which the word has been used, it has been held not to mean that there must be physical prevention, but that any acts, conduct or declaration of the party evincing a clear intention to repudiate the contract and to treat it as no longer binding, are a legal prevention of performance.* After some further discussion, the opinion proceeds: "*Without further quotation from cases, it seems clear both upon principle and authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by*

his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect a prevention of performance by the other party and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the parties that he will no longer be bound, or by acts and conduct which clearly evidence that that determination has been reached and is being acted upon."

(Italics throughout this brief are ours.)

The result of the authorities, both English and American—and no case holding to the contrary has been cited—is that where there has been a repudiation of a contract, a cause of action in favor of the innocent party at once arises, and that if one chooses to say that prevention of performance is necessary in such cases, the repudiation is a prevention. (30 L. R. A. 48.) Moreover, the complaint clearly shows that the repudiation was never "retracted," but was persisted in by defendants month by month until after the expiration of the contract. Performance by plaintiff was therefore excused. (C. C., Sec. 1440.)

As to the third count. This count, as well as the second, concerns the period from the end of April, 1907, to the end of the term of the contract. Unlike the second count, however, it proceeds upon the theory of *performance* by plaintiff. Upon this count, plaintiff relied at the first trial, and, as pointed out above, this court held that the evidence did not establish perform-

ance on his part. Since this count was not involved upon the last trial, and we do not claim the right to recover thereunder, it may be dismissed from consideration. Very clearly, however, it does set forth a cause of action based upon the theory of performance.

As to the fourth count. In this count plaintiff seeks to recover \$237.45, representing commissions on return premiums which had been advanced and paid by plaintiff at the instance and request of defendants. That the general demurrer interposed to this count was correctly overruled requires, we think, no argument.

As to the demurrer to the complaint as a whole. In addition to the foregoing points, the demurrer points out an alleged ambiguity in the complaint growing out of the circumstance that the amount demanded in the second count differs from that demanded in the third. However, it is elementary that each count must be considered by itself and apart from the others, and the allegations of one count cannot be invoked to show an ambiguity or inconsistency in another.

Stockton, etc., Co. v. Glenn Fall Insurance Co.,
121 Cal. 171.

It is, therefore, respectfully submitted that the demurrer to the complaint was properly overruled.

IV.

ASSUMING, SOLELY FOR THE PURPOSES OF THE ARGUMENT, THAT THE FACTS AND CONCLUSIONS OF LAW UPON WHICH THE COURT BELOW BASED ITS GENERAL

FINDING IN FAVOR OF PLAINTIFF ARE OPEN TO REVIEW UPON THIS APPEAL, SUCH GENERAL FINDING WAS PROPER, AND THE ONLY ONE WHICH THE EVIDENCE WARRANTED.

We have pointed out above that since the case was tried by the court without a jury under stipulation of the parties, and no special findings were made, neither the facts nor the conclusions of law upon which the general finding in favor of plaintiff was based are open to review, and that the sole question presented by the record is whether the demurrer to the complaint was properly overruled. We propose now to assume, solely for the purposes of the argument, that the scope of the appeal is not so limited and to show that the general finding of the court is amply sustained by the evidence.

We pass, first, to a consideration of the cause of action based upon defendants' repudiation of the contract (second count), for that is the only count which is discussed in the brief of plaintiffs in error. Afterwards, the count relating to plaintiff's salary for the month of April, 1907 (first count), and the count relating to the commissions on unearned premiums which were paid out by plaintiff at defendants' request (fourth count) will be considered.

1. *The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover upon the ground of defendants' repudiation of the contract during the last eleven months of the term thereof.*

The principle of law upon which the second count —

the one wherein defendants' repudiation of the contract is the gravamen of the cause of action—is based, has already been stated. It is that when two persons have entered into a contract involving reciprocal obligations to be performed at a future time, and one of the parties repudiates the contract and gives notice that he will not be bound thereby, nor perform the same on his part, the other is entitled, if he pleases, to treat the repudiation as a final and total breach of the contract and to commence an action for unliquidated damages.

See authorities cited, *supra*, pp. 14, 15.

It is quite true, as already stated, that defendants alone could not by repudiation of the contract put an end to it. The termination of the contract could only be effected by both parties—as it is said in the decisions—by the plaintiff *adopting* the renunciation,—and he could elect to adopt it or not, as he chose. The repudiation first occurred in June, 1906. It was persisted in month by month, until the Supreme Court decided against the defendants in December, 1909, nearly two years after the term of the contract had expired.

Mr. Levy did not adopt the renunciation of the defendants in June, 1906, nor until near the end of April, 1907, at which time he gave them notice of his intention to adopt their repudiation if persisted in. (Tr., p. 78.) They replied, in effect, that they would maintain the position which they had taken until the courts should *ultimately* hold that it was untenable; that they would accept the views of their own counsel (these views, it may be said in passing, are set forth above

(p. 7) in their counsel's own language, and were, of course, well known to Mr. Levy and his counsel), and would "seek the legal determination of the question in dispute." Such determination, it is shown by the record, could not have been had until after the expiration of the term of the contract. (Tr., p. 68.) In their letter the defendants added that "if the courts should *ultimately* determine that the destruction of the principal part of the City of San Francisco, by reason of which destruction plaintiff's ability to perform the contract between himself and the companies was destroyed does not release the companies under that contract, then the plaintiff will be paid the \$1,000 per month which he is *now* seeking to recover," referring undoubtedly to the action then pending covering plaintiff's salary for the first year. (Tr., p. 11.)

Accordingly, in May, 1907, Mr. Levy commenced his suit as for a total breach and renunciation of the contract, and for all damages accrued and to accrue. (Tr., p. 12.) This was an adoption by plaintiff, in May, 1907, in conformity with his letter, of the defendants' repudiation then still persisted in and reaffirmed by their letter of April 29, 1907.

That Levy, though he had not adopted the repudiation in June, 1906, could nevertheless do so in May, 1907, is clear. There was a continuing renunciation each month, and a continuing refusal to pay his salary each month, and it would seem plain that as he had a remedy each month he could select any the law allowed.

He could, in May, 1907, for the first time cease to treat their renunciation as *brutum fulmen* (L. R. 16 Q. B. D. 473), and then treat it as serious, and consider the defendants guilty of a final breach.

Canada, etc., Co. v. Flanders, 165 Fed. Rep. 321.

It is said, however, that notwithstanding the letters referred to and the commencement of the action by plaintiff in May, 1907, plaintiff did not elect to adopt defendants' renunciation of the contract, since after April, 1907, he placed his business with defendants. It is the "law of the case," however, that plaintiff did *not* perform during the period he deducted the fifteen per cent. That he continued business relations with defendants after April, 1907, is entirely immaterial. He was not obliged to move to some other city, or to refrain from all relations with the companies. It is enough that the transactions which he had with defendants after the end of April, 1907, were not had *under the contract*, and, as now firmly established as the "law of the case," did not constitute performance thereof.

Defendants cannot claim that they received the business placed with them by plaintiff during this period under a contract, the existence of which they at all times denied; nor can they be permitted now to assert what this court has denied, viz.: that plaintiff in fact performed the contract during the period under discussion. We need go no further upon this point, however, than the answer of defendants in this case, wherein they allege that "the fire insurance business which he (plaintiff) did bring to the office of the defendants, *he*

"brought as a commission broker, retaining and deducting from the premiums collected by him such commissions as are allowed all brokers," and further that *"such business was brought upon a commission basis, such as is allowed and is the custom with all agents, and not under the terms of the contract which the plaintiff failed, refused and neglected to perform in any part whatsoever."* This clearly shows defendants' understanding and purpose in receiving the business placed with them by Levy during the period in question.

Defendants' own admission, therefore, as well as all of the evidence in the case, is against the claim now made. It would be enough, in this connection, to refer to the letter of April 27, 1907, and to the fact that immediately thereafter plaintiff commenced his action in the Superior Court upon the renunciation. Unquestionably, these facts show an adoption by plaintiff of the renunciation and an intention to act thereon. Plaintiff's intention in April and May, 1907, is thus evident, and in the absence of clear evidence showing that he changed his intention, it must be presumed that it continued thereafter unchanged. (C. C. P., Sec. 1963, Subd. 32.) In addition to all this, the record shows that the suit upon the renunciation was at all times prosecuted by plaintiff until it was dismissed by the Superior Court after the expiration of the term of the contract; whereupon this action was brought in this Court. This, certainly shows no abandonment of purpose. Moreover, as we have pointed out, the fact is now established

as the "law of the case" that plaintiff did not in fact perform during the period in question. There is no evidence opposed to all this, and the court therefore properly found that plaintiff at no time changed his purpose to adopt defendants' renunciation and hold them thereon.

It is true that the character of the business done with defendants after the end of April, 1907, and the procedure followed in transacting it was much the same as before that date; but this is far from showing that it was therefore done *under the contract*. With whomsoever plaintiff did business, the nature and course of business would have been substantially the same. If A sells B an article and before delivery B repudiates his contract, declaring that it was never executed, or that it has been rescinded, A has his action against B as for a repudiation of the contract; and he does not waive it because B afterwards accepts the article under some other arrangement, or upon some other terms. Obviously, after the repudiation, A is not cut off from all business relations with B, at the risk of losing his right of action. It is equally clear that when B accepts the article, at the same time asserting that he does not do so under the old contract, the existence of which he denies, he cannot afterwards be heard to claim that he in fact received it under such contract.

The Civil Code (Sec. 1440) says that if a party to an obligation gives notice to another before the latter is in default, that he will not perform the same upon his part, *and does not retract such notice before the time at which*

performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party. In the present case it is not pretended that the notice given by defendants was ever retracted. It follows that plaintiff is entitled to maintain this action.

The transactions had between plaintiff and defendants after April, 1907, are material only as they relate to the measure of damages; for the defendants are, of course, entitled to a credit for whatever amount was, in fact, earned, or could have been earned by plaintiff during the period of the breach. It was plaintiff's duty, as stated by the trial Court during the hearing, to mitigate defendants' loss and reduce their damages as much as possible. This he did by continuing his employment, securing all the business he could and placing it with the defendant companies.

That plaintiff received commissions during this period from defendants, rather than from other insurance companies, is entirely immaterial. Obviously, it was greatly to their benefit that he should have placed the business with them, rather than with other companies. Whether plaintiff had placed the business with the defendants or with others, the amount of the commissions received by him must be deducted from the \$11,000 claimed as damages under the second count, and such amount was, in fact, deducted by the court in determining the amount of the judgment. The correctness of this measure of damages was expressly conceded in the

as the "law of the case" that plaintiff did not in fact perform during the period in question. There is no evidence opposed to all this, and the court therefore properly found that plaintiff at no time changed his purpose to adopt defendants' renunciation and hold them thereon.

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lower Court by counsel for defendants when the question whether the case should be tried by a jury or by the Court without a jury was under discussion. (Tr., p. 87.)

Schroeder v. Cal. Yukon Trading Co., 95 Fed. 296 (De Haven, J.)

It may be observed in passing that section 1440 of the Civil Code says that repudiation makes it unnecessary that the innocent party should perform, or offer to perform, "any conditions" upon his part to be performed. And so are all the authorities.

Gray v. Smith (C. C. A. 9th Cir.) 83 Fed. 825, Gilbert, J;

Stakes v. Mackay (N. Y.) 41 N. E. 499.

It is also urged that, notwithstanding defendant's repudiation of the contract, plaintiff was not *prevented* from performing; and from this the conclusion is drawn that he was therefore required to perform. We think that the Code section referred to is a sufficient refutation of this contention; for all that it requires is a notice, unretracted, that the party "will not perform the contract upon his part." If these conditions exist the innocent party, in the language of the statute, is entitled to sue "without previously performing or offering to perform any conditions upon his part in favor of the former party." It was not necessary that the notice should have been accompanied by any actual prevention or performance.

It may be true that defendants were willing to accept Levy's business, inasmuch as they had announced their intention not to pay for it. But they were never ready

to accept it *under the contract*. That they were willing to accept it without paying for it, or upon terms different from those provided in the contract cannot strengthen their position, or render their repudiation of no effect.

Before leaving this branch of the argument, it is proper to point out that the doctrines of repudiation and prevention of performance are entirely distinct. A repudiation will give rise to a cause of action before performance is due—before it is possible under the contract—and therefore before it could have been prevented. It is not necessary, therefore, that “the notice that the party will not perform the contract upon his part” (C. C., Sec. 1440) should be accompanied by any prevention of performance.

Repudiation means only a renunciation of the obligations of the contract. In *Roehm v. Horst*, 178 U. S. 8, Chief Justice Fuller states the doctrine to be that “if a contract provides for a series of acts, and actual default is made in the performance of one of them, *accompanied by a refusal to perform the rest*, the other party need not perform but may treat the refusal as a breach of the entire contract, and recover accordingly.” It is the declaration of the party that he will not perform any of the obligations of the contract to be performed on his part that gives rise to the cause of action. It is not necessary that the renouncing party should go further and declare that he will not *receive* performance from the other party. He may be quite willing—and naturally in all cases would be—to re-

ceive whatever the other party would render, without giving any equivalent or performing any of the obligations of the contract to be performed by him. But this willingness on his part does not destroy the effect of his renunciation of the obligations of the contract. If one gives "notice that he will not perform on his part" (C. C., Sec. 1440)—if, in the language of Judge Fuller, his breach of one provision of the contract is "accompanied by a refusal to perform the rest"—the innocent party may sue and recover his damages without either performing, or tendering performance.

Any other rule would require that the innocent party, notwithstanding the other's repudiation of the contract, should, during the entire term of the contract extending perhaps over years, either perform, or hold himself in readiness to perform, knowing all of the time the other would not perform, and that he would at the end be compelled to resort to a lawsuit and take his chances of being able to satisfy any judgment which might be obtained by him. In the avoidance of these consequences, and in the fact that the damages of the party renouncing his contract may be thereby greatly mitigated, the doctrine of repudiation has its principal justification.

Notwithstanding, as has been said, that the doctrines of "repudiation" and "prevention of performance" are entirely distinct, it is true, as already pointed out, that in some of the cases this fact has not been kept in mind, and repudiation is spoken of as involving a prevention of performance. The sense in which the term "prevention

of performance" is used in this connection may, however, be seen from the following quotation from the case of *Lakeshore Ry. Co. v. Richards*, 152 Ill. 59; 36 L. R. A. 33, where it is said:

"Stress is laid by counsel upon the words 'prevented from going on' . . . *The same language . . . i. e., that the suing must be prevented from performance has been used in numerous cases, but whether the attention of the Court has been directly called to the sense in which the word has been used, it has been held not to mean that there must be physical prevention, but that any acts, conduct or declarations of the party evincing a clear intention to repudiate the contract and to treat it as no longer binding, are a legal prevention of performance.*

After some further discussion, the opinion proceeds:

"Without further quotation from cases, it seems clear, both upon principle and authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the parties that he will no longer be bound, or by acts and conduct which clearly evidence that that determination has been reached and is being acted upon."

We submit, therefore, that plaintiff was entitled to judgment under the second count of the complaint. The amount of his damages thereunder, as was agreed by defendants' counsel in the court below, is the difference between \$11,000 and \$3588.88 (the amount received by him as commissions upon the business of the second year) or \$7411.12, together with interest.

2. *The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover his salary for the month of April, 1907.*

We pass, now, to a consideration of plaintiff's cause of action to recover the salary for April, 1907.

Since, under the contract, plaintiff's salary was payable to him "monthly," the April salary was due on the last day of that month. (*Webster v. Cook*, 38 Cal. 433.)

It is conceded that the first default on his part occurred in June following, and that in April all premiums were remitted without deduction. Insofar, therefore, as concerns anything required to be done by plaintiff prior to April 30th, 1907, it is admitted that it was fully performed.

It is proper in this connection, and while considering the question whether the withholding in June of fifteen per cent. of the April premiums deprives plaintiff of the right to recover his salary for April, to observe that the contract imposed no duty upon the plaintiff to collect and remit the premiums in question, and that the record shows that this is *res adjudicata* between the parties and cannot therefore be disputed by either of them. If it were permissible to add entirely new

terms to a written and unambiguous contract by showing a course of conduct between the parties, or even a general custom, (which we deny: *C. C. P. Sec. 1870*, Subd. 12; *Withers v. Moore*, 140 Cal. 597), it is at least clear that this cannot be done in the present case; for it was expressly found in the action in the Superior Court that "*the written agreement aforesaid contained all the agreements and understandings of the parties.*" (Tr., p. 7.) This finding and determination, we respectfully submit, is, of itself, a sufficient answer to the contention that the April salary was not earned, because of the deduction made by plaintiff in June.

But if this question is not *res adjudicata* here, it is at least clear that the absence of any provision in the agreement for collection and remission of premiums, points very strongly to the conclusion that the collection and remission thereof could not have been intended by the parties as a condition precedent to the right of plaintiff to recover the salary in question. It is well established that conditions precedent are not favored in the law and that the presumption is always against a provision in a contract having been intended by the parties as such (*Diepenbrock v. Luiz*, 159 Cal. 718); and where the parties have entirely failed to include a provision in their written contract (even though under some proper rule of construction it may be read into it by the courts), the conclusion is almost inevitable that it could not have been intended as a condition precedent. As said in *Ridpath v. Evening Express Co.*, 4 Cal. App. 367;

“At law it was only where the obligation broken by the plaintiff was a condition precedent to defendant’s obligation that the breach was a defense. Nor was any obligation of the contract regarded as a condition precedent unless made so by the express terms of the contract, or by necessary implication. (1 Chitty’s Pleadings, 121, 322; Civ. Code, secs. 1439, 1498; Code Civ. Proc., Sec. 457; Anson on Contracts, 287, 303 et seq., 308 et seq., 376 et seq.) *But here the obligation broken is not expressed in the contract and was probably not thought of by the parties, but is a merely implied obligation added to the contract by construction of law.* (Civ. Code, secs. 1643, 1655, 1656.) *It could not, therefore, have been regarded by the parties as a condition precedent to the defendant’s obligation.”*

There are, however, other and very potent facts which point even more strongly to the conclusion that the payment in June was not intended as a condition precedent to the obligations of defendants, to pay the April salary. Mr. Conroy’s testimony showed that it was not expected of plaintiff that the premiums upon policies issued in April should be paid until between forty-five and sixty days thereafter. (Tr., p. 82.) The time for the payment of the salary was, however, definitely fixed by the contract at the end of the month. *Plaintiff could have commenced suit on May 1st and recovered therefor.* This circumstance of itself is enough to show that the condition for payment of the April salary was entirely independent of the other condition under discussion. Being independent, it was not

necessary that plaintiff should either plead or prove performance thereof.

Pollack v. Brush, etc., Assn., 128 U. S. 452;

Deacon v. Blodgett, 111 Cal. 416;

Purser v. Eagle Lake Co., 111 Cal. 139, 144.

Other considerations lead to the same conclusion. The sum of \$1,000 clearly was due to plaintiff on April 30th; otherwise plaintiff could not have sued therefor on May 1st. And it was due in June when the first deduction was made by plaintiff. The Code of Civil Procedure (Sec. 440) says that when cross-demands exist, so that if one party should commence an action the other party might set up a counterclaim, such demands shall be *deemed compensated* to the extent to which they equal each other. Plaintiff was therefore entitled in June to offset his demand for the April salary against the amount then due the defendant companies. It was unnecessary that he should pay them the amount withheld in June (\$484.03) and then demand of them its repayment. Instead of so doing, it was his right, if he chose, to deduct the \$484.03 from the amount defendants owed him, and he cannot be charged with any default because he exercised such right.

Not only is this so, but in April, 1907, as we have seen, the defendants definitely repudiated the contract and denied all liability on their part thereunder. When this occurred, it is conceded that plaintiff was not in default in his contract in any particular. After the repudiation he was not required to either perform, or offer to perform. For this reason, the default in June

was altogether immaterial, and furnishes no defense to this count.

Gray v. Smith (C. C. A. 9th Cir.), 83 Fed. 825;

Scribner v. Schenkel, 128 Cal. 250;

Pierce v. Lukens, 144 Cal. 397.

With the statement of one additional reason why plaintiff was entitled to recover the April salary, we will pass from this subject to the fourth count of the complaint. Contracts often require that each party shall perform a number of different acts, but it by no means follows that a non-performance of one of them is intended by the parties to result in a forfeiture of all of the rights of the party who has thus failed to keep the contract in its entirety. It is elementary law that where a covenant is *independent*, which is always the case where it is to be performed, or may be performed, *after* another (*Bush v. Stromberg, etc., Co.*, (C. C. A. 8th Cir.), 217 Fed. 325, 333; *Donovan v. Judson*, 81 Cal. 338; *Goldsborough v. Orr*, 8 Wheat. 218; *Quinlan v. Green County* (C. C. A. 6th Cir.)—a failure to perform it results only in making the party who has failed to perform liable to compensate the other party in damages—not that the latter shall be entirely excused from performance of his obligations under the contract.

Kauffman v. Raeder (C. C. A. 8th Cir.) 108 Fed. 171;

Central, etc., Co. v. Buchanan, 73 Fed. 1006; (Taft, J.)

Samson v. Somerset, 6 Gray, 120. 122;

Turner v. Konvenhoven, 100 N. Y. 115;

Ernst v. Cummings, 55 Cal. 179.

3. *The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover the amount paid out by him representing commissions on unearned premiums.*

The fourth count, as already stated, is based not upon the written contract, for the latter is silent with respect to any matters connected with the return of premiums, but upon an implied contract to repay moneys laid out and expended by plaintiff for defendants' benefit. The evidence shows without conflict the amount of such payments (\$237.45) (Tr., pp. 71, 72) and the course of business between plaintiff and defendants pursuant to which they were made. It is not claimed that defendants ever made any objection to this course being pursued, or to plaintiff's making such payments on their behalf, but, on the contrary, it shows that the latter at all times received the benefit thereof. If, therefore, it could be shown that the payments were originally made without authority, yet defendants clearly ratified the same.

V.

ANSWER TO ARGUMENTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

In a preceding subdivision of this brief, we have endeavored to show that the sole matter which is reviewable upon this record is the order of the lower court overruling the demurrer to the complaint. (*Supra*, pp. 9 to 11). If we are correct in this, it is apparent that almost all of the discussion contained in the brief of plain-

tiffs in error is directed to questions with which this court is not concerned. Notwithstanding this, in the following pages, we shall endeavor to answer all of the arguments advanced by plaintiffs in error in their brief, without, however, intending any abandonment of our position that the questions discussed by opposing counsel (save that relating to the sufficiency of the complaint) are without the jurisdiction of this Court.

Throughout the brief of plaintiffs in error, we find the assertion repeatedly made in one form or another, that plaintiff cannot recover because at the first trial of this case, and in this Court on the former appeal, he took the position that he had performed the contract. In the same connection it is urged that the "law of the case" has in some way been established contrary to the contentions now urged by us.

The complaint, however, as originally filed in this court, and as it now stands, contains a count based upon performance (Count III-Tr. pp. 13-15), *and also one based upon defendants' repudiation* (Count II-Tr. pp. 10-13). At the former trial, as we have already pointed out, the Court, at the request of the defendant companies, charged the jury that plaintiff had "elected to rely upon his performance" of the contract (199 Fed. 410, 411), and then proceeded to instruct them that in order that plaintiff might recover, it was necessary that he should have fully performed, etc. As a consequence, none of the issues offered by the second count were involved or determined either in the lower court or in this court on the former appeal. For every purpose,

the case upon the former trial and appeal stood as one in which no claim was made for damages based upon defendants' repudiation of the contract.

Upon the last trial, recognizing that the decision upon the former appeal determines that there can be no recovery under the third count, we make no claim thereunder. That count, therefore, is as effectually removed from this case as the second count was upon the first trial. The issues upon the last trial, it is therefore clear, are entirely different from those involved on the former trial and appeal.

Not only were the issues and questions which were involved upon the first trial and appeal entirely different from those now involved—which circumstance, we take it, is sufficient answer to the claim that the "law of the case" was determined against plaintiff upon the first appeal (2 Hayne on New Trial and Appeal, p. 1669)—but also, at the second trial, additional evidence was introduced. (Tr. pp. 80-85). Besides, the "law of the case" applies "only to principles of law announced in a case and not to mere questions of fact"; and, therefore, even had this court upon the former appeal expressed an opinion as to the facts, this would not have been binding upon the lower court upon the new trial, nor upon this court upon this appeal. We may add, in view of the statement on page 11 of the brief for plaintiffs in error, to the effect that this court having decided against plaintiff upon the former appeal, it is bound to decide against him upon this appeal, that it is well established that "the law of the case" can never be invoked except-

ing as to such matters as were *actually considered and determined* by the appellate court. See in this connection 2 Hayne on New Trial and Appeal, p. 1674; *Wixon v. Devine*, 80 Cal. 385, in which it was said that because the doctrine tended to prevent a judicial consideration of the case, "its application would not be extended beyond the cases in which it had been held to apply," and *Mattingly v. Pennie*, 105 Cal. 516, (opinion by Judge Van Fleet).

We think that it is not improper to add, in this connection, that it was the intention of Mr. W. S. Goodfellow, who, at the first trial, tried the case on behalf of the plaintiff, that it should be submitted to the jury under all four of the counts, and that he had not intended to elect, or considered that he had elected, to proceed under the first, third and fourth counts, to the exclusion of the second. When, however, the court charged the jury as just stated, no objection was made for the reason that it was then considered that the evidence was ample to sustain a verdict under the third count.

On page 12 of the brief of plaintiffs in error, it is said, "Plaintiff having admittedly failed to perform the contract, the only remaining question is, was he excused from performing by reason of any act or omission on the part of the companies. *The evidence shows only one act of omission, namely, their refusal to pay the sum of \$1,000 per month when the same became due.*" In the same connection, the cases of *Cox v. McLaughlin*, 54 Cal. 605, and *Palm v. Ohio, etc., Railroad Co.*, 18 Ill. 219, are cited. (Brief for Plaintiffs in Error, page 13).

The persistency shown by opposing counsel in endeavoring to reform the evidence to fit a rule of law which has no application to this case, is worthy of a better cause. The plain distinction between the cases cited and the one at bar is that in the case under consideration the evidence shows—not merely a “refusal to pay the sum of \$1,000 when it became due,” i. e., a failure to perform—but a *repudiation by defendants of the contract*. See *Supra*, pp. 21 to 32.

Cox v. McLaughlin (cited on page 13 of the brief for plaintiff in error) went to the Supreme Court a great number of times. Cox had a contract with McLaughlin to build a railroad. The work was to be paid for in instalments. The court, nevertheless, held the contract to be one and entire. After Cox had built the first twenty miles, he demanded his instalment and McLaughlin failed to pay. *He did not, however, repudiate the contract nor deny his liability, or his intention to carry out the contract in the future*. In one of the cases it appears that he was in fact raising the money in New York. (76 Cal. 76). Cox treated this failure to pay the overdue instalment as a prevention from completing the subsequent portion of his contract. His letter to McLaughlin appears in Volume 44 of the Reports at page 20, and the reply of McLaughlin appears on the same and next page. In his various appeals (52 Cal. 592, 54 Cal. 605, 63 Cal. 195), Cox persisted in suing upon the contract to recover the contract price. The Supreme Court continuously held that he could not so recover without performance or tendering performance which

had been prevented, and that the non-payment of an overdue indebtedness by McLaughlin was not prevention of performance. Finally, in 76 Cal. at page 60, he amended his complaint and was allowed to recover, not the contract price, but on a *quantum meruit*, the value of the work he had performed. Throughout the cases, McLaughlin's position was that the contract had not been repudiated.

In the case reported in 52 Cal., the distinction between a repudiation of the contract and neglect or inability to comply with it was noted. At the top of page 596, the Court says that there was no finding or evidence that McLaughlin "prevented, by notifying plaintiffs that he would pay *none* of the instalments as they should become due," and on page 597, *Hale v. Trout*, 35 Cal. was distinguished upon the ground that in that case the defendants repudiated the contract.

The case of *Palm v. Ohio, etc., R. R. Co.*, 18 Ill. 217, cited in defendants' brief, p. 17, was decided upon precisely the same principle as *Cox v. McLaughlin*. In neither case was there any repudiation of the contract by defendant. All that was claimed by plaintiff was that there was a mere failure to pay instalments as they became due. This, of course, was not the equivalent of a repudiation of the contract. All this is very clearly pointed out in the later case of *Lake Shore R. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 50, where the *Palm* case is referred to and shown inapplicable upon the facts.

It is further contended in this connection that the action of defendants did not amount to a repudiation

for the reason that the defendants notified plaintiff that they would take his business and would, as to compensation, settle with him according to the outcome of the litigation in the State Court. It is no disputed, however, that the "legal determination" spoken of in the letter of defendants' counsel could not have been had until after the contract would have expired. (Tr., p. 68.) How idle, then, was this statement made in the letter? It amounted merely to a declaration that defendants would pay if, and when, they were compelled to by final judgment of the courts; but this was true, without any declaration of the parties. Can a party to a contract state and reiterate (as these defendants admittedly have on every occasion—in season and out—from shortly after the earthquake until long after the expiration of the contract) that he is not bound by a contract and will not perform its obligations on his part to be performed, and then nullify the effect of his declaration as a repudiation by adding to it the truism that if the courts make him pay, he will pay? A mere statement of the contention now made, we submit, is its own refutation.

On page 15, the case of *Tatum v. Ackerman*, 148 Cal. 357, is cited. Clearly, however, it lends no support to the position of plaintiffs in error. What was there decided is shown by the sentence (which follows the quotation from the opinion found on page 15 of the brief of plaintiffs in error), reading: "In such cases, (i. e., when, before performance is due on the part of one of the parties to a contract, he gives notice to the other that he will not perform) *when performance on his part is due*, and not

before, if such notice is not retracted, the other party may enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." (p. 160.) In other words, the court holds merely that section 1440 of the Civil Code does not authorize the commencement of an action *before performance is due*. Here, the action was commenced after the expiration of the term of the contract, and therefore after performance was due.

In the second subdivision of their brief, plaintiffs in error state that, "the theory upon which counsel for defendant in error proceeded at the second trial is that "Levy at the expiration of the first year of the contract "treated the rescission by the companies *of the year previous* as a renunciation and elected to consider the contract terminated and to sue once and for all for damages." (Brief for plaintiffs in error, p. 15.) In view of what has been said, it is hardly unnecessary for us to comment upon the inaccuracy of this statement. As has been pointed out, the renunciation by defendants was persisted in month by month during the entire term of the contract.

Pages 15 to 20 of the brief of plaintiffs in error are devoted to an attempt to show that plaintiff did not accept defendants' renunciation of the contract. In this connection it is suggested that Levy not having adopted the repudiation in June, 1906, could not do so in May, 1907. No authority, it may be observed, is cited in support of this contention. As we have pointed out, there was a continuing rescission each month and a continuing

refusal to pay his salary each month, and it is plain that as he had a remedy each month he could select any the law allowed. He could, in May, 1907, for the first time cease to treat their renunciation as *brutum fulmen* (L. R. 16 Q. B. D. 473), and then treat it as serious, and consider the defendants guilty of a final breach.

Canada, etc., Co. v. Flanders, 165 Fed. 321.

That plaintiff "adopted" the renunciation of defendants, and at all times thereafter insisted upon and asserted his right to recover therefor, we refer the court to the correspondence between the attorneys for the respective parties, (Tr. pp. 77, 78, 11); to the fact that in the month following this exchange of letters, plaintiff commenced his suit in the Superior Court as for a total breach of the contract, and for all damages accrued and to accrue (Complaint para. XVIII-Tr. p. 12), which suit he continued to prosecute at all times during the remainder of the term of the contract, and until its dismissal in August, 1910 (Complaint para. XVIII-Tr. p. 12); and to the fact that shortly after such dismissal he commenced this action and again set forth therein his claim that defendants had repudiated the contract. Because at the first trial of this case, *which was held long after the contract had expired*, his counsel mistook the legal effect of his previous acts, and considered that they constituted performance, when in point of law (as determined by the opinion of this Court upon the former appeal) they did not, can it be said that he has lost his cause of action? This claim of defendants finds as little support in justice as it does in authority.

Agar v. Winslow, 123 Cal. 590;
Brown v. Fletcher, 182 Fed. 973 (C. C. A. 6th
 Cir.)

On page 23 of the brief for plaintiffs in error the case of *Johnston v. Milling*, 16 Q. B. is cited. Though we think there can scarcely be a shadow of doubt that defendants in the case at bar in the most unequivocal manner repudiated, and continued at all the times in question to repudiate and renounce the contract, we quote the following from the opinion in that case for the purpose of showing what is meant by the term "repudiation" as used therein. It is there said: "It is necessary that plaintiff's language should amount to a declaration of intention not to carry out the contract or that it should be such that defendant was justified in inferring from it such intention." In the face of the evidence in this case, and the admissions made in the pleadings and by defendants' counsel at the trial, who can doubt either that defendants declared their intention not to carry out the contract or that Mr. Levy so understood them? That the latter accepted their repudiation, we submit, is equally clear. (See *Supra*, pp. 23 to 28.)

The case of *Dingley v. Oler*, 117 U. S. 500, cited on page 17 of the brief for plaintiffs in error, has no application to the case at bar. In that case, the defendants were entitled, under the contract to deliver ice to plaintiffs at such times during the year 1880 as they (defendants) should elect (117 U. S. 501). In July they wrote the plaintiffs declining to make delivery then, but stating that they would ship it later during that season when

the price was lower than it then was. The court held, therefore,—and properly held—that there was no renunciation of the contract. How different this case is from the one at bar is evident when it is considered that in the present case, the defendants, as is admitted in the pleadings and shown without conflict, by the testimony, repeatedly asserted and claimed during the entire last eleven months of the term of the contract that the contract had been rescinded, and that they would not be bound thereby.

In *Hanson v. Slaven*, 98 Cal. 379, there was no repudiation of the agreement. On the contrary, defendant expressly stated to plaintiff that the latter “will get his stock. . . . I will give him his stock” (p. 382). This, the court said “was a promise to deliver the stock at a future day, and indicated a perfect willingness to deliver it.” In the case at bar, the situation was entirely different, for defendant, as we have pointed out, at all the times in question *denied the validity of the contract*, “claiming and asserting, as alleged in paragraph VIII of the complaint, and not denied in the answer,” that the said agreement was no longer in force or effect and that they would not perform on their part any of the obligations thereof. (Tr., pp. 5, 11, 84.) In the face of the record we are totally unable to see how opposing counsel can claim that defendants’ refusal to perform was not “explicit and positive.”

On pages 18 and 19 of the brief for plaintiffs in error it is said—and the statement is repeated many times in the course of their brief—that Levy could not “after the

expiration of one year," consider the action of the attempted "rescission as a repudiation." It seems hardly necessary to point out that the record shows that this repudiation by defendants occurred not only in June, 1906, as is attempted to be claimed by defendants, but that it was made and persisted in month by month during the entire period in question. As we have already pointed out, this is admitted in the pleadings, and is established by all of the evidence in the case and by the admissions made by defendants' counsel at the trial.

On page 19 of the brief for plaintiffs in error, three circumstances are stated, which are said to show that Levy was attempting to perform the contract during the second year. Though we think this argument has already been sufficiently answered in the preceding pages, we add the following:

First, as to the circumstance that Levy placed all of the business which he was able to secure with the defendants. That he continued business relations with defendants after April, 1907, is entirely immaterial. As pointed out, he was not obliged to move elsewhere, or to refrain from all relations with the companies, upon pain of losing his cause of action. It is enough that the transactions which he had with the defendants after the end of April, 1907, were not had *under the contract*, and as is now firmly established as the "law of the case," did not constitute performance thereof.

Defendants cannot claim that they received the business placed with them by plaintiff during this period under a contract, the existence of which they at all times

deny; nor can they now be permitted to assert what this court has denied, namely, that plaintiff performed the contract during the period under discussion.

As stated by Judge Van Fleet in his opinion:

“It is not by what plaintiff hoped to accomplish by his acts that the result is to be determined, but by the legal effect of what he did; and although plaintiff’s course did not, as he evidently hoped, constitute in law a performance, this result cannot militate against his right to have those acts construed, if they are otherwise sufficient, as entitled him to maintain the alternative right to recover as for a breach. He had suffered a wrong through defendants’ renunciation of his contract, and finding that he could not change their attitude in that regard he determined to treat it as a breach and proceed in a manner that would enable him to have recompense for their default in one form or the other. In this there was no wrong to the defendants. It was but a precaution to protect himself from loss by reason of their refusal to carry out their contract.” (Tr., pp. 88, 89.)

The inferences drawn by the trial court from the evidence in this connection, we submit, were within its province, and were the only inferences which could properly be drawn therefrom.

As to the third circumstance referred to on page 19 of the brief for plaintiffs in error, namely, the making of a monthly demand for payment. As we have already pointed out, the testimony of Mr. Conroy was that this demand was not made during the second year. (Tr. p. 82.) This circumstance, we think, renders it unnecessary to make further answer to this contention. We may add

that even if made, there is nothing to show whether it was for liquidated or unliquidated damages.

In the third subdivision of the brief of plaintiffs in error, it is claimed that the judgment is excessive, for the reason that it "was computed by allowing Levy \$1,000 per month during the last eleven-month period of the contract between himself and the companies with interest from the date that each instalment of \$1,000 would have become due under the contract." (Brief for Plaintiffs in Error, p. 20.) Though clearly the amount of the judgment is not a question which is open for review here (see authorities cited, *supra*, pp. 10, 11 and *Southern Pacific Co. v. Cavin* (C. C. A. 9th Cir.), 144 Fed. 348, 352), we beg to point out that opposing counsel are in error in their statement relative to the way in which the amount of the judgment was computed.

As stated by Judge Van Fleet in his opinion, the basis of recovery was not in dispute (Tr. p. 89). Though the amount of damages recoverable under the second count was unliquidated, it was expressly agreed in court by counsel for both sides when the question whether the case should be tried by the court or by a jury was under discussion, that the proper basis of recovery under the second count, in the event that plaintiff was entitled to judgment thereunder, was the difference between \$11,000 and the several sums plaintiff received in the form of brokerage, aggregating \$3588.88, together with interest. Upon this statement being made, it was considered by us that a jury was unnecessary, and it was agreed that it might be tried by the court without a jury.

In order that the correctness of the computation may be seen, we submit the following:

Salary for April, 1907.....	\$ 1,000.00
Amount of damages sustained by plaintiff on account of defendants' repudiation of the contract during the last eleven months thereof, \$11,000, less \$3588.88.....	7,411.12
Amount of commissions on return premiums	237.45
Interest as prayed (Tr., p. 52)	5,432.96
	<hr/>
	\$14,081.53

It is said, however, in connection with the amount of the unliquidated damages allowed under the second count, that there should have been deducted the amount of office expenses incurred by Levy. This, we submit, would not be just, since defendants admittedly received the benefit of the services of Levy and his office force, including M. S. Levy. (Tr., p. 74.) Even, however, were the case otherwise, it is clear that there is nothing in the record to show the amount of these expenses. That the burden of proof in this regard rested upon defendants is well settled.

See cases cited, 26 Cyc. p. 1006.

On page 22 of the brief for plaintiffs in error, after quoting what is termed the trial court's "interpretation" of the complaint, it is said: "This is the very situation "which our courts have uniformly condemned." Whatever the rule may be in other States, in this State it is firmly established that a plaintiff may state his cause of action in inconsistent counts, and the Supreme Court

has held that it is error to require him to elect between them and rely upon one only.

Rucker v. Hall, 105 Cal. 429.

Stockton, etc., Works v. Glenn Falls Insurance Co., 121 Cal. 171.

The effect of a contrary rule, it is said, would be "to require him to hazard a guess as to the case he had made out" (12 Cal. App. 751). The justice of the rule is well illustrated by this case. We may add, in reference to the quotation on page 22 from the case in 107 Cal. 254, that it clearly has no application to a case where the inconsistent causes of action are set out in distinct counts, as in the case at bar.

At the bottom of page 22 of the brief for plaintiffs in error, it is urged that it is "the duty of plaintiff in an action where he pleads both performance and non-performance to elect at the trial upon which theory he intends to proceed, and thereupon he is bound by such election." The authorities, however, are otherwise.

Agar v. Winslow, 123 Cal. 590;

Brown v. Fletcher, 182 Fed. 973.

The brief of plaintiffs in error closes as it opens, with the assertion that the decision of this court upon the former appeal is to the effect that proof of performance is necessary; that the record upon the last trial is the same as that upon the first trial, and that we are consequently concluded by the "law of the case" as made upon the former appeal. In reply, we again point out that the issues offered in the second count relative to de-

fendants' repudiation of the contract were not before the jury for consideration upon the first trial, having been withdrawn from them by the charge (199 Fed. 410, 411); that consequently, the record before this court on the former appeal was similarly limited, and that the issues and record upon the last trial and upon this appeal are entirely different from those presented on the former appeal.

For the reasons stated, it is respectfully submitted that the judgment should be affirmed.

GOODFELLOW, EELLS, MOORE & ORRICK,

Attorneys for Defendant in Error.

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY
(a corporation), ROCHESTER GERMAN
INSURANCE COMPANY (a corpora-
tion), CALEDONIAN AMERICAN IN-
SURANCE COMPANY (a corporation)
and SCOTTISH UNDERWRITERS
(a corporation),

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR
FILED PURSUANT TO PERMISSION
GRANTED.

T. C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Plaintiffs in Error.

Filed this.....day of November, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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(a corporation), ROCHESTER GERMAN
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tion), CALEDONIAN AMERICAN IN-
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Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR FILED PURSUANT TO PERMISSION GRANTED.

In his brief heretofore filed, and upon his oral argument, defendant in error has made the point that plaintiffs in error cannot be heard upon the merits because of the fact, first, that no special findings were made, and, second, they did not, upon the trial of the case in the court below, make formal motion for nonsuit.

Defendant in error makes the further point that defendant in error is in any event entitled to an affirmance of the judgment on his first count, for the reason that the evidence shows that he performed the contract during the month of April, 1907.

I.

We respectfully submit that the contention first stated is without merit. The case was tried before the court sitting without a jury under a written stipulation and was submitted upon the evidence taken at the former trial and the testimony of Mr. Conroy corroborating and not conflicting therewith. In other words, the facts were as testified to upon the former trial and without conflict as between the witnesses upon any point, all agreeing that the dealings as between Levy and the companies subsequent to the attempted rescission were as presented to this court upon the former appeal and upon which it was held that defendant in error could not recover. This was as held by this court in its opinion upon our first appeal. *The question presented to the court for decision was purely one of law*, to wit, whether or not, upon the evidence, which, as we have said, was without conflict upon any point, judgment ought to go for plaintiffs in error or for defendant in error. To make evident that it was a pure question of law which was submitted to the court below and that this court so

held, we have but to quote from the opinion of this court upon the former writ of error where Mr. Justice Ross says:

“The facts of the case are undisputed. It is so conceded by counsel and so stated by the trial court. * * * In our opinion there was nothing for the jury to pass upon. The real question in the case being one of law.”

And in the opinion of the trial judge rendering his decision upon the second trial, it is stated that “the evidence as to what was done by the parties tending to establish performance was substantially the same” as on the former trial (Trans. of Record, p. 86). And it is part of the record upon the last trial that Mr. Levy refused to accept the rescission of the companies and that the latter went on and took the business as theretofore (Trans. of Record, p. 84).

Our position in the court below was, as it is now in this court, that the defendant in error, upon the undisputed facts in the case, could not have judgment, for the reason that the evidence upon which the submission was based was the same evidence, which, on the former trial, was offered by Levy to support his contention that he *had performed* his part of the contract. He now contends that he *did not perform* only because plaintiffs in error had repudiated the contract and that he had accepted such repudiation as a termination of the contract. It is inconceivable that the same evidence can be offered to prove performance at one trial of

the case, and to prove non-performance at a second trial. If such a situation can exist, then it can exist only as a matter of law. It was upon such theory that the case was tried in the court below, and submitted practically upon an agreed statement of fact. This is borne out by the record. We quote from pages 67 et seq. of the Transcript:

“The COURT. That was the proposition upon which the case was reversed, was it not?

Mr. ORRICK. Yes.

Mr. Wise then made the opening statement on behalf of defendants.

Plaintiff's counsel thereupon offered to submit the case on the evidence taken on the former trial thereof as shown in the reporter's transcript of said trial, supplemented by such additional testimony as should be offered. In the course of the discussion which ensued, Mr. Van Ness said:

‘Mr. VAN NESS. I am willing to admit, and it seems to me that the admission is as broad as anything you could claim. In the beginning we took the position that by reason of the destruction of San Francisco we were released and so notified you, and you considered we were not released and insisted on going on with the contract. I told you that if we were wrong in our view we would pay you the \$1000 a month. We took that position from the beginning to the end.’

The court then ordered, pursuant to the agreement of the parties, that the evidence taken at the former trial as shown by the reporter's transcript thereof, should be considered in evidence at this trial.”

It is apparent that the intention of both parties was to submit the case on the entire record of the

previous trial. This obviously was meant to include, not only the oral testimony, but the rulings of the court and the exceptions reserved. It was so considered not only by counsel but also by the court, and we submit that in arriving at a decision, the court below treated the case as submitted upon an agreed statement of facts.

And we respectfully submit that in such a case as this the appellate court should decide the case upon its merits as a question of law.

Southern Railway Co., Plaintiff in Error,
v. Atlanta National Bank, Defendant in
Error, 50 C. C. A. 558; 56 L. R. A. 546;

Erkel v. U. S., 169 Fed. 623;

Ins. Co. v. Kelly, 114 Fed. 268;

City of Mankato v. Barber Asphalt Paving
Co., 142 Fed. 329;

Board of Supervisors of Wayne Co. v. Ken-
nicott, 103 U. S. 554;

Fellman v. Royal Ins. Co., 185 Fed. 689;

Levy v. Caledonian Ins. Co. et al., 199 Fed.
407, 411;

Porter v. Davies Co., 223 Fed. 467;

Hipple v. Bates Co., 223 Fed. 23;

Wiborg v. U. S., 163 U. S. 638-58; 16 Sup.
Ct. 1127; 41 L. Ed. 289;

Clyatt v. U. S., 197 U. S. 207; 25 Sup. Ct.
429, 49 L. Ed. 726.

In the case first above cited suit was brought by the bank against the railway company to recover

because of wrongful delivery of cotton shipped upon its road and upon bills of lading issued upon which the bank had loaned money. As in the case at bar, the trial was before the court without a jury and was submitted for decision upon the report of an auditor, to whom there had been a reference to take testimony, and as to the facts reported by him there had been in that case, as in this, an agreement that the facts were as stated in the report of the referee, and the submission was to the trial court upon these facts, and in the upper court the question for decision was whether or not upon the facts as stated in the report of the referee and in the opinion of the trial judge judgment should go for plaintiff or defendant in error. In other words, as stated in the opinion in the case which we have cited the case was submitted "for the court to enter a judgment therein on the law and the facts without the intervention of a jury", and upon this stipulation the trial court, as in the case at bar, proceeded to consider what conclusion it ought, as a matter of law, to draw, and what judgment it ought to render. It will be seen that both the trial and the appellate courts dealt with the question thus submitted to them as one of law, not calling for any preliminary motion to the trial judge, or exception to ruling by him, but only a ruling in the appellate court as to the correctness of the judgment reached upon the undisputed facts upon which the trial judge was called to act.

We respectfully submit that the submission in the court below can permit of no other interpretation than a submission upon an agreed statement of facts, or, as stated by this court in the Erkel case, referred to above, "upon a case stated". Under such a submission it has been uniformly held that the agreed statement or "case stated" will be considered as a special finding and the appellate court will review the question as to whether such agreed statement or "case stated" is sufficient to support the judgment.

Mr. Justice Gilbert in *Erkel v. U. S.*, 169 Fed. 623, says:

"It is well settled that no question of law can be reviewed on error except those arising upon process, pleadings or judgment *unless* the facts are found by a jury by a general or special verdict, *or are admitted by the parties upon a case stated.*" (Italics ours.)

Where an action at law tried by the court without a jury is submitted on an agreed statement of facts which is filed and made a part of the record (same as bill of exception here), such statement is the equivalent of a special verdict and the court's conclusion of law based thereon is subject to review.

Ins. Co. v. Kelly, 114 Fed. 268.

Where a jury is waived pursuant to Sections 649 and 700 Revised Statutes, and no special finding of facts is made, or requested, the only questions reviewable by the Circuit Court of Appeals are:

1. Whether judgment is supported by pleadings.

2. *Whether there is any substantial evidence to support it.*

3. Whether error has been committed in admission or exclusion of evidence. (Italics ours.)

City of Mankato v. Pacing Co., 142 Fed. 329.

A judgment on agreed facts spread at large on the record, can be reviewed in the appellate court on writ of error.

Board of Supervisors of Wayne Co. v. Kenicott, 103 U. S. 554.

In Fellman v. Royal Ins. Co., 185 Fed. 689, the court holds:

That suing out a writ of error is a sufficient exception to judgment; also, that where there is an *agreed statement of facts the upper court will review.*

In Levy v. Caledonian Ins. Co. et al., 199 Fed. 407, at 411 (the case at bar), through Mr. Justice Ross, the court says:

“There was a verdict for plaintiff. In our opinion there was nothing for a jury to pass upon; the real question in the case being one of law.”

And such being so, the record here is tantamount to an agreed statement of facts, or “case stated”, and should be treated as such.

The request of counsel for the receiver at the close of the evidence for findings and judgment in his favor has the same effect as a request for an instructed verdict.

Porter v. Davies Co., 223 Fed. 467.

Where a case was tried upon an agreed statement of facts, although that statement was *quite prolix and with much redundant matter*, but contained the ultimate facts upon which the case depended, such an agreed statement of facts is treated like special findings by a trial court, or a special verdict by the jury, and as to whether the facts stipulated to are sufficient to support the judgment will be reviewed. (Italics ours.)

Hipple v. Bates Co., 223 Fed. 23.

It has also been held that where the error is apparent the fact that no request for a directed verdict is made will not prevent the appellate court from considering the sufficiency of the evidence.

Wiborg v. U. S., 163 U. S. 632-58; 41 L. Ed. 289;

Clyatt v. U. S., 197 U. S. 207; 25 Sup. Ct. 429; 49 L. Ed. 726.

The same rule must apply to a case where no specific motion for nonsuit is made where the case is tried by a court sitting without a jury.

The court will notice plain error not assigned.

Rule 11, C. C. A.

It is conceded by defendant in error that the question of whether the demurrer to the original complaint was properly overruled, may be considered by this court. An examination of the record discloses that the complaint sets forth the material facts relied upon by Levy to support a recovery. Even assuming that the other assignments of error may not be considered, we respectfully submit to

this court that the argument made by us in our first brief applies as well to the demurrer to the complaint as to the insufficiency of the evidence. This brings us within the rule suggested in *City of Mankata v. Barber Asphalt Paving Company*, 142 Fed. 329, where it was held:

“Where a jury is waived by stipulation in a circuit court and no special finding of fact is made, the only questions reviewable by the Circuit Court of Appeals are whether the judgment is supported by the pleadings *whether there is any substantial evidence to support it*, and whether error was committed in the admission or exclusion of evidence. Most of the important facts relied on by defendant city to defeat recovery appear in the pleadings. For this reason, we are fortunately able to consider their merits, unembarrassed by the rule just stated.”

It has never been the policy of our courts to decide an appeal upon technical defects in the record, but wherever possible, to determine the case on its merits. From the authorities cited by us, we respectfully submit that this court is relieved from any embarrassment in this regard, and we believe that a consideration of this appeal upon its merits entitles plaintiffs in error to a reversal of the judgment with instructions to the trial court to enter judgment for defendant in error in the sum of \$237.45, being the amount claimed under the fourth count of the complaint.

Without juggling with words, the submission in this case and the requests of plaintiffs in error for a judgment upon the facts was as much a motion

for nonsuit as if put in that form. Our position in the court below was, as it now is in this court, that defendant in error upon the undisputed facts in the case could not have judgment for the reason that, from the evidence upon which the submission was based, there had been a failure to perform his part of the contract and that within the law of the case as settled by this court judgment must go for plaintiffs in error, and that he could not be heard upon his new contention that he had not performed and was asking damages by reason of the breach of the original contract by the defendant companies. In other words, we asked the court to hold that upon each and all of the facts conclusively and without conflict established by the evidence defendant in error had failed to make a case and as matter of law could not recover upon either his original or later contention. Of course, until the decision by the trial court there could be no exception taken to the action of that court for the reason that there had been no decision by it, and, therefore, there was nothing to except to.

And as we have seen in the opinion of the trial judge rendering his decision upon the second trial, it is stated that "*the evidence as to what was done by the parties tending to establish performance was substantially the same*" as on the former trial (Trans. of Record, p. 86).

And that the trial judge did not find that the deduction of the fifteen per cent for the purpose of paying office expenses during the second year was

intended by Levy to negative his claim of performance is entirely plain. We quote from the opinion of the judge upon this point (Trans. of Record, p. 88):

“During the remainder of the period covered by the terms of the contract, while plaintiff continued as before to take his insurance to the defendants, he from that date withheld the usual brokerage fees of fifteen per cent., instead of paying the premiums in their entirety to the defendants as stipulated in the contract. It is true that this was done in a manner to indicate that plaintiff believed, or at least hoped, that the course he was pursuing would constitute a substantial compliance with the terms of the contract, and enable him to recover therefor, and that was the theory upon which the first trial proceeded.”

The learned trial judge adds:

“In fact there is no doubt but what plaintiff did in the premises was intended to give him ‘two strings to his bow’. In other words, that if his acts did not constitute a performance it would put him in a position to recover as for a breach.”

No further comment upon the last quotation from the opinion of the trial judge than such as hereinbefore and hereinafter is made is necessary.

As to what is said by Judge Van Fleet in his opinion (Trans. of Record, p. 89) to the effect that plaintiff’s refusal at first to acquiesce in defendants’ renunciation of the contract did not preclude him from his subsequent determination to do so: that

“the contract was one which gave him a new right of action monthly, and he was entitled to change his course as to defendants’ renunciation at any time before the contract was at an end as to all payments thereafter falling due”,

it is only necessary to say that what Mr. Levy did was not an acceptance of the companies’ previous renunciation at any time during the life of the contract. From month to month during the second year he went on, according to his theory, performing as he understood the meaning of the contract but not performing as understood by this court because we have seen what he did was intended to operate as performance, and the deduction of the fifteen per cent was not intended to be a renunciation of performance.

In this connection, and as demonstrating that the situation below was, and is, as stated, we have but to call the court’s attention to the fact that both parties submitted the cause to the court with an implied request for judgment! What other interpretation can be placed upon the act of submission? Certainly it was not an idle submission. The cause came on for trial on December 11, 1913, and the court did not, until September 25, 1914, render its decision. What other interpretation can be made of the record than that each party submitted its cause to the court below, each asking for judgment?

The new testimony of Mr. Conroy upon the second trial did not in any way tend to make a different case. That Mr. Levy did not during the

second year demand payment of the one thousand dollars (\$1,000) at the end of each month was not in anywise an alteration of his position that he had performed and was performing upon his part. He went on giving *all his* business to the plaintiffs in error, and giving them credit for all the brokerage commissions received by him upon business placed with other companies. *His explanation that during the second year he was retaining the usual brokerage commission of 15% to meet his office expenses is strongly conclusive upon the proposition that during all of the second year, there was a continuing claim of performance upon his part, for otherwise no such excuse could have been called for.*

We further submit that the position of defendant in error taken upon the last trial should have received the condemnation of the trial court as we believe it will that of this court because of the fact that it was nothing more or less than a wretched subterfuge, held out as a door through which the court might pass in support of a judgment in favor of plaintiff. As pointed out in our opening brief, defendant in error was called upon in the trial court to elect whether he would proceed upon the theory of performance or non-performance, and, thereupon, after full consideration, with advice of counsel, he had elected to proceed upon the theory of performance, and under oath, and in both the trial court and this court, maintained that there had been no failure of performance upon his part; that he had performed, and that he was entitled to

judgment as upon full performance, *contending that he had the right, under the contract, to retain the fifteen (15) per cent brokerage commission upon business placed with the defendant companies as a means of meeting his office expenses, and that this did not constitute a breach of the contract upon his part.* In other words, he, in effect, under the advice of counsel, struck out from his complaint all but his cause of action based upon his claim of performance, but, according to his present theory, reserving the right, if beaten upon that theory, to come back and say that what he had previously claimed under oath was not true and that the court should now and in the face of this stultification permit him to recover as against plaintiffs in error. This claim of non-performance is now made in the face of the admitted fact that it was plaintiff's intention and purpose to perform.

But whether right or not as to the attempt of defendant in error to change his position since the former trial it has been plainly shown that there is absolutely no merit in this contention and that from beginning to end he insisted upon the maintenance of the contract in force, and that he had from start to finish performed and was performing the contract. His demand at the end of each month during the first twelve months for the thousand dollars, which the contract provided should be paid him, is conclusive upon this point as was his placing during all of the second year of all his business with the defendant companies and

the giving of credit to them, whenever they were unable to accept the business which he offered, of the premiums upon such business placed with other companies, accompanied by his explanation as to why he deducted the 15% for office expenses. The facts upon which this contention is based are the same facts upon which, upon the first trial and the first appeal, the case was submitted in the lower court and in this court, except upon the last trial the testimony of Mr. Conroy was added which corroborated but did not upon the question of performance change the record of the first trial. It is upon the same facts that judgment was asked for upon the second trial. It was not contended that there had been any change as to the facts or that there was any conflict upon which judgment should go in his favor as against the defendant companies. The question for decision therefore was one of law, and we submit that both upon principle and under the authority of the cases which we have cited the controversy between the parties is a matter of law and not upon a disputed question of fact, and, therefore, under the authorities cited the case stated is to be considered as a special finding, within the jurisdiction of this court to pass upon. That both the trial court in the opinion which it has rendered as did this court upon the former appeal have looked upon the question for decision as one of law and not calling for the decision of any conflict in the evidence is entirely apparent and should be

conclusive upon the point which we have been discussing.

II.

Defendant in error contends that the evidence was sufficient to justify the court in finding that Levy was entitled to recover his salary for the month of April, 1907. His right to recover this amount is based solely upon the theory of performance. As to this court, the decision thereof upon the previous appeal is, we submit, *res adjudicata*. It was held that Levy did not perform during any portion of the second twelve month period. This included the month of April, 1907. No attempt was made at the trial to amend the complaint as to this first count, which proceeded solely upon the theory of performance. No new or different testimony was offered to support this count. The only justification offered by defendant in error to support the judgment of the trial court as to the first count, is that the evidence shows that the fifteen per cent brokerage fee which was deducted by Levy during the second year was not retained from the April business until June. The second year of the contract commenced April 1, 1907. The record shows (Trans. of Record, p. 73) :

“Q. After April 1, 1909, and for the second twelve month period, Mr. Levy deducted from the volume of business which he produced fifteen per cent commission, the same commission which any broker would have received

who brought the business into Mr. Conroy's company?

A. Yes, sir."

The reason that such deduction was not made until June was that under a well established custom of the insurance business, settlement of premiums on fire insurance is not made until sixty days after the insurance takes effect. During the entire life of the contract, Levy collected the premiums on insurance written by him and settlement was made for premiums collected sixty days after they became due. We quote from the Transcript, page 70:

"We did not bill the assured for sixty days. At that time we were allowed sixty days for collection of premiums."

For that reason, the deduction of the fifteen per cent on the April business could not be made until June, 1907. We quote again from the Transcript, page 72:

"The COURT. Did you pursue the same course and place all your business through that office after that date, the same as before?

A. Yes, your Honor.

Q. But after that date you did deduct the 15 per cent commission on premiums?

A. In making our payments, yes, sir.

Mr. GOODFELLOW. Q. After the month of June I thought you said?

A. It was during the month of June, but that was for the insurance of the month of April, previously placed."

The fact that the deduction was in June and not in April does not in the least change the fact that

there was not performance for April. The record shows that such deductions made in June were for April business. We respectfully submit that the law of the case settling the proposition that Levy did not perform his contract during the month of April, 1907, has disposed of this contention of defendant in error.

Dated, San Francisco,
November 15, 1915.

Respectfully submitted,

T. C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Plaintiffs in Error.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

CALEDONIAN INSURANCE COM-
PANY, et al.,

Plaintiffs in Error,

VS.

S. W. LEVY,

Defendant in Error.

**Answer of Defendant in Error to Supplemental
Brief for Plaintiffs in Error**

GOODFELLOW, EELLS, MOORE & ORRICK,

Attorneys for Defendant in Error.

Filed

Filed this.....day of November, 1915.

F. D. Monckton,

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals
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Defendant in Error.

} No. 2634.

ANSWER OF DEFENDANT IN ERROR
TO SUPPLEMENTAL BRIEF FOR
PLAINTIFFS IN ERROR.

By permission of the Court, this brief is filed in answer to the supplemental brief of plaintiffs in error, filed herein after the argument.

At the top of page 2 of the supplemental brief, it is said that "defendant in error makes the further point " that defendant in error is *in any event* entitled to an "affirmance of the judgment on his first count, etc." To this it need only be said that we believe—and think we have shown in our brief—that plaintiff is entitled to an affirmance of the entire judgment.

I.

In the first subdivision of the brief, it is argued that no special findings of fact were required, in order that the sufficiency of the facts to sustain the general finding may be reviewed. The various reasons urged in support of this conclusion will be considered in the order in which they are stated in the brief.

It is first said that the evidence was not in conflict. Strictly speaking, however, this is not so. For example: Mr. Conroy testified that no demands for the thousand dollars were made during the second year (Tr., p. 82); whereas, Mr. Wren gave testimony which, it was argued by the defendants in the court below, showed that demands were made during the second year. (Tr., p. 74.)

But even if the evidence were not in conflict in any respect, it is nevertheless well settled that the rule invoked by us would be applicable. As stated by Mr. Justice Brewer in *Lehrer v. Dickson*, 148 U. S. 77, 13 Sup. Ct. 484:

"The burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts; and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the

case in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

On page 4 of the supplemental brief, defendants urge that the "case was tried in the court below, and submitted practically upon an agreed statement of fact." This, however, was never the intention either of the trial court or of counsel for plaintiff. On the contrary, the offer of plaintiff's counsel, and the order of the court, was that the case should be submitted upon "the *evidence* taken at the former trial thereof, as shown in "the reporter's transcript of such trial, supplemented "by such additional testimony as should be offered." (Tr., pp. 67, 68.) There was no agreement either as to the probative or ultimate facts. And the offer and order were made merely—as was understood by all at the time—for the purpose of expediting the submission of the evidence to the trial court for its decision as to the ultimate facts which followed therefrom and as to the law applicable thereto. In lieu of calling the witnesses to give their testimony *viva voce*, plaintiff's counsel offered, and the court in effect ordered, that the testimony given by the witnesses upon the first trial might be considered again given by them, and that in addition, the parties might submit further testimony. And such additional testimony was introduced by plaintiff. (Tr., pp. 80-83.) Will it be said that there was any agree-

ment as to the truth of the latter? And if not, how can it be said there was any agreement as to the former?

Again it was the *evidence, as shown in the reporter's transcript at the former trial*, together with the additional testimony which was offered, upon which the case was submitted. If, therefore, there was any agreed statement of facts—which we deny—it is evident that it is to be found in the reporter's transcripts of the two trials, neither of which was filed or is before this Court. In lieu thereof, there is a bill of exceptions made up long after judgment was entered. Defendant's counsel, therefore, have yet to explain how, even upon their own theory, the bill of exceptions can be said to be an agreed statement of facts. That the agreed statement must not only contain a statement of all of the ultimate facts and be stipulated to by the parties before the submission, but must also be filed in the court below, are propositions which are fully sustained by the authorities. As said by Judge Van Devanter, in *U. S. v. Sioux City Company*, (C. C. A. 8th Cir.), 167 Fed. 127, speaking of a special finding—and the same thing is true of an agreed statement—

“The special finding contemplated by the statute is a specific statement of those ultimate facts upon which the law must determine the rights of the parties. It corresponds to the special verdict of a jury, is equally specific and responsive to the issues, *and is spread at large upon the record as part thereof in like manner as is such a verdict.*”

That there was *actually* no agreed statement in the case at bar is too clear for argument; for, as we have

shown, there was no agreement whatsoever as to the facts. It is equally clear that even had it been stipulated by the parties that the reporters' transcripts of the two trials, or the bill of exceptions to be thereafter prepared, might be deemed an agreed statement of facts, and even had the transcripts or bill, as the case may be, been filed in the court below before submission, neither would have been the equivalent of an agreed statement within the authorities, for the reason that neither contains any findings or statement whatever as to the *ultimate* facts.

In *Mutual etc. Assn. v. Du Bois*, 85 Fed. (C. C. A. 9th Cir.) 586, the case had been tried upon a so-called "agreed statement of facts." The statement, however, was not a statement of the *ultimate* facts, but a mere agreement as to the evidence. The court held that there was nothing presented which it might consider. Mr. Justice Morrow, delivering the opinion of this Court, said:

"The agreed statement of facts is therefore merely a report of the evidence; and whether it appears in the opinion of the court or in the bill of exceptions, it cannot be deemed a special finding."

Quoting from the opinion of Judge Lurton in *Insurance Co. v. Hamilton*, 63 Fed. 588, the court said:

"We did not and cannot regard the so-called 'agreed statement of facts' found in this record as in any sense the equivalent of a special finding of facts. It does not purport to be a statement of the ultimate facts, but a mere agreement as to the evi-

*dence to be submitted to the court as bearing upon the issues presented by the pleadings. To treat the evidence thus submitted as an agreed statement of facts, equivalent to a special finding of facts, would require this court, on a writ of error, to examine the evidence as it was submitted to the court below, and confound all the distinctions which distinguish an appeal from a writ of error. The bill of exceptions sets out the numerous applications, notices, letters, policies, charters, and by-laws therein referred to as having been read upon the hearing. What ultimate facts are proven by all this evidence are not shown by the agreement itself, nor is there any special finding of facts based upon all this evidence by the trial judge. An agreed statement of facts which will be accepted as the equivalent of a special finding of facts must relate to and submit the ultimate conclusions of fact, and an agreement setting out the evidence upon which the ultimate facts must be found is not within the rule stated in *Supervisors v. Kennicott*, 103 U. S. 554."*

(Italics throughout this brief are our own.)

A writ of *certiorari* was refused by the Supreme Court (171 U. S. 688).

In *Wilson v. Merchants etc. Co.*, 183 U. S. 127, 22 Sup. Ct. 58, a statement of facts had been agreed to, which, in addition to containing a statement of some of the ultimate facts, found the evidentiary facts from which the ultimate facts might have been found. In holding that such a statement could not supply a special finding of facts, the court said, by Mr. Justice Peckham:

"As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the Court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case, the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608.

"In this case the finding is general, and, strictly construing the statute the only questions which would be reviewable would be those questions which arose during the progress of the trial, and which were presented by bill of exceptions. It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. *Wayne County Supers v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486. *But as such equivalent, there must of course be a finding or agreement upon all ultimate facts and the statement must not merely present evidence from which such facts or any of them may be inferred.*

"An exception to a general finding of the court on a trial without a jury brings up no question for review. The finding is conclusive, and there must be exceptions taken to the rulings of the court during the trial in order to permit a review thereof. *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827.

“Here, although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts, together with certain other facts evidential in their nature from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. *In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute.*”

In *Raimond v. Terrebonne Parish*, 132 U. S. 192, the parties had made what they called a “statement of fact,” and the cause was submitted to the trial court upon this statement. The statement consisted of the instrument sued on, a reference to the plaintiff’s deposition on file, an abstract of the testimony of another witness for the plaintiff, and a statement of the proof offered by the defendant. The Supreme Court held that since this statement did not determine the ultimate facts, it could not be deemed the equivalent of a special finding of the facts so as to enable the court to review the sufficiency of the evidence or the legal conclusions upon which the judgment was based. Said the court, speaking through Mr. Justice Gray:

“By the settled construction of the acts of Congress defining the appellate jurisdiction of this court, either a statement of facts by the parties, or a finding of facts by the Circuit Court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ulti-

mate facts, or from which they may be inferred. *Burr v. Des Moines Co.*, 1 Wall 99; *Norris v. Jackson*, 9 Wall. 125; *Martinton v. Fairbanks*, 112 U. S. 670.

"In short there is nothing in the present case, which can be called, in any legal or proper sense, either a statement of facts by the parties, or a finding of facts by the court; and no question of law is presented in such a form as to authorize this court to consider it."

In *Glenn v. Fant*, 134 U. S. 400, Mr. Justice Fuller, delivering the opinion of the Supreme Court, said:

"What is styled here an 'agreed statement of facts' is an agreement as to certain matters, and that the parties might refer to and rely upon any and all grounds of action or defense to be found in two voluminous exhibits X and Y, being the records of two equity causes in other courts, including all the pleadings and evidence, as well as the orders and decrees therein. The effect of some of that evidence and of the conclusions of fact to be drawn from it is controverted. It is impossible for us to regard this stipulation as taking the place of a special verdict of a jury, or a special finding of fact by the court, upon which our jurisdiction could properly be invoked to determine the questions of law thereon arising."

That an opinion of the court, even, will not take the place of a special finding, see:

Bishop, etc., Co. v. Baker, Etc., Co., 139 U. S. 222;

U. S. v. Sioux City, etc., Co. (C. C. A. 8th Cir.), 167 Fed. 127;

Kentucky, etc., Ins. Co. v. Hamilton, 63 Fed. 93;
Yorks v. Washburn, 129 Fed. 568;
Clapman v. Bowen, 207 U. S. 91.

We submit, therefore, that the record in the present case does not fill the requirements laid down by the Supreme Court and by this Court for an agreed statement of facts which will take the place of a special finding of facts. As we have pointed out, there was, in the first place, no agreement whatever as to the facts, either probative or ultimate. In the next place, the statement, if any was made, is shown to have been as to the *evidence*, which is to be found in the reporters' transcripts of the two trials, which are not before the court. And in the last place, even had the two requirements last referred to been fulfilled, the record contains a mere collection of evidence, with no finding upon any ultimate facts. The attempt, obviously, is to make a bill of exceptions take the place of a special finding, upon the claim that the bill is the equivalent of an agreed statement of facts. That this can be done is well established.

St. Louis v. Western Union, etc., Co., 166 U. S. 390;

Corliss v. Pulaski County, (C. C. A. 7th Cir.)
 116 Fed. 291.

Before leaving this branch of the subject, we desire to add to the citations found on page 10 of the brief for defendant in error the last decision of this Court upon the point there under consideration:

Phoenix Securities Co. v. Dittman, (C. C. A. 9th Cir.) 224 Fed. 892.

Passing, now, to the authorities cited in the supplemental brief upon this point, it is apparent from even the most casual examination of them that they lend no support to defendants' position.

Southern Railway Co. v. Atlantic Bank, 50 C. C. A. 558, 56 L. R. A. 546. (Supp. Brief, p. 5). On page 551 (56 L. R. A.), the court said that the questions were: "(1) Are the pleadings of the plaintiff sufficient to support the judgment; (2) Do the facts *found* by the trial judge support the judgment." The court had filed written opinions in the case and had caused an order to be entered "that the opinions rendered by the court in the above stated cause be, and the same are hereby, made a part of the record in said cause." The Circuit Court of Appeals in effect held that even this did not constitute a special finding of facts within the rule, stating:

"It cannot be that the many pages of record matter to which this certificate refers are to be received and considered by us as the special findings of fact, and it may well be doubted if, under the conditions in which the case was tried in the Circuit Court, it is our duty to thresh through all this matter and winnow out the special findings which it may contain. If so, it is very difficult to distinguish between a review of such a judgment on writ of error and a review on appeal of a decree passed in equity."

In *Erkel v. United States*, 169 Fed. 623, the judgment was affirmed for the reason that the case was tried by the court without a jury, and there was no written stipulation waiving a jury. The opinion of Judge Gilbert, however, clearly lays down the rule relied upon by us. As said by him:

“It is well settled that no question of law can be reviewed on error except those arising on the process, pleadings or judgment, ‘unless the facts are found by a general or special verdict, or are admitted by the parties upon a case stated.’ ” (624).

In *Mutual Life Insurance Co. v. Kelly*, 114 Fed. 271, as shown by the opinion:

“The cause was submitted to the court upon an agreed statement of facts signed by counsel for the respective parties, filed and made a part of the record, and that no other evidence whatever was heard at the trial.”

City of Mankato v. Barber, etc., Co., 142 Fed. 333. The sentence in Judge Adams’ opinion reading, “whether there is any substantial evidence to support “it” (p. 333) is quoted in the supplemental brief as laying down a rule contrary to that contended for by us. We confess that it is not entirely clear to us what was meant by this language. However, it is abundantly clear from the citations which may be found on page 333 of the opinion following the above quotation, that the court did not intend to lay down any rule opposed to that relied on by us. For example, in *Yorke v. Washburn*, 129 Fed. 566—one of the cases cited in the opinion

—the court, speaking through Judge Van Devanter, says that “whether the finding be general or special, it has the same effect as the verdict of the jury, and in the manner in which it is given is conclusive, and prevents any inquiry in this court as to whether it is sustained by the evidence.”

In *Supervisors v. Kennicott*, 103 U. S. 554, cited on page 5 of the supplemental brief, there was an agreed statement of facts spread on the minutes.

This was the case, also, in *Fellman v. Royal Insurance Company*, 185 Fed. 691, and in *Hipple v. Bates County*, 223 Fed. 23, where the court said that the agreed statement of facts “contained the ultimate facts “upon which the case depended.”

Neither of the criminal cases cited at the bottom of page 5 (163 U. S. 638; 197 U. S. 207) seem to us to have any bearing on the matters in controversy in this case. The question here involved does not turn upon any rule of court, *but upon a statute of the United States*. And the Supreme Court has held that parties will be held to a strict compliance with the provisions of the statute.

Flanders v. Tweed, 9 Wal. 425.

At the bottom of page 4 it is said that “it is apparent “that the intention of both parties was to submit the case “on the entire record of the previous trial. This obviously was meant to include, not only the oral testimony, but the rulings of the court and the exceptions “reserved.” A sufficient answer to this statement would

seem to be that the bill of exceptions shows no rulings of the court, and no exceptions by defendants.

On page 9 of the supplemental brief, it is urged that the trial court erred in overruling the demurrer to the complaint, and in this connection it is said that "an examination of the record discloses that the complaint sets forth the material facts relied on by Levy to support a recovery." (p. 9.) This is entirely true, and these facts, as shown in our brief on file herein, undoubtedly state a cause of action. The facts stated, however, are *ultimate* facts, and since the demurrer confesses them, the court is relieved from a consideration, not only of the question most discussed in defendants' brief herein, *i. e.* whether the evidence establishes a repudiation of the contract by defendant at the end of April, 1907, and during the remainder of the term of the contract, but also, we think, of every other question which is seriously argued in defendants' briefs.

As bearing upon the issue of "repudiation," we respectfully direct the attention of the court to the allegations of the complaint that the defendants at all times after April, 1907, "persisted in claiming and asserting " that the said contract had been rescinded and was no " longer in force or effect, and at all times continued to " repudiate the same on their part, and refused to be " bound thereby, etc." (Tr., p. 12); and at all times until the decision by the Supreme Court of California, hereinafter referred to, the defendants persisted in claiming and asserting that said agreement was no longer in force or effect, and that they would not per-

form on their part any of the obligations thereof, and wholly repudiated the said agreement and refused to perform the same, in whole or in part." (Tr., p. 5.) Since the demurrer concedes the truthfulness of these allegations, as well as that of all others in the complaint, we are unable to see how defendants can hope to satisfy the court that any error was committed in the overruling of the demurrer.

On page 14, it is again urged that "defendant in error was called upon in the trial court to elect whether he would proceed upon the theory of performance or non-performance, and thereupon, after full consideration, he had elected to proceed upon the theory of performance, etc." "* * * In other words, he, in effect, under the advice of counsel, struck out from his complaint all but his cause of action based upon his claim of performance * * *." Counsel have unintentionally failed to state the matter with entire accuracy. (See in this connection, Brief for Defendant in Error, p. 40.) Be this as it may, however, plaintiff clearly was not estopped from proceeding at the last trial upon the theory upon which he did.

Agar v. Winslow, 123 Cal. 590;

Brown v. Fletcher, 182 Fed. 973.

At the bottom of page 16 of the supplemental brief, it is said "that both the trial court in the opinion which it has rendered, as did this court upon the former appeal, have looked upon the question for decision as one of law and not calling for the decision of any conflict in the evidence is apparent and should be con-

“clusive upon the point which we have been discussing.” We think sufficient answer has already been made to this contention. There could be no decision as to the law, excepting upon and in respect of certain ultimate facts, and these, as already stated, are all involved in and found in plaintiff’s favor by the general finding in favor of plaintiff. Moreover, as stated in *Boardman v. Toffey*, 117 U. S. 272, “the general finding prevents all inquiry by us into the special facts *and conclusions of law* on which that finding rests.”

II.

In the second subdivision of the supplemental brief, it is urged that the plaintiff is not entitled to recover under the first count, for the reason that at the last trial “no new or different testimony was offered to support this count.” (p. 17) This question, however, is not before the court, for, as pointed out in our brief, neither the facts nor the conclusions of law upon which the general finding in favor of plaintiff was based, nor the amount of the judgment, are open to review upon this record. (Brief for Defendant in Error, pp. 9-11, 50.) Since no special findings were made or requested, neither the question how the judgment of the lower court was arrived at or what elements and amounts entered into it, or under what counts it was rendered, is involved. As we understand the decisions of the Supreme Court and of this Court, under the circumstances shown by the record in this case, the appellate court will not, and cannot, investigate whether any re-

covery was allowed under any particular count, nor review the process by which the court below reached its conclusion that the plaintiff was entitled to judgment herein. On the contrary, "the general finding prevents " all inquiry by us into the special facts and conclusions " of law on which that finding rests." (*Boardman v. Toffey*, 117 U. S. 272.)

Notwithstanding all questions as to the amount of the judgment and as to the facts and conclusions of law upon which it is based are foreclosed by the general finding made by the court below, and therefore, as we understand, the questions whether any recovery was allowed under the first count, or whether the entire recovery was allowed under other counts, are not before the court,—we propose to show that assuming that such inquiry is open, the plaintiff was not foreclosed by the previous decision of this Court. And, first of all, it may be remarked that the defendant in error does not admit that the evidence at the two trials was identical, or substantially identical, as claimed by plaintiffs in error. On the contrary, the record shows that at the last trial additional and important evidence was introduced. (Tr., pp. 80-83.)

Wallace v. Sisson, 114 Cal. 42.

Be that as it may, it is clear, we think, that the opinion on the former appeal establishes no principle which precludes the plaintiff from recovery under the first count. Upon the former appeal, the court held that the instruction which is quoted at page 412 of 199 Fed. was erroneous, and reversed the judgment. Counsel,

however, did not argue, and the court did not consider, whether a *portion* of the judgment could not be sustained upon the theory upon which the case was submitted to the jury; but it being obvious, upon the principle laid down by the court, that the judgment must be reversed, the *entire* case was sent back for a new trial. Upon the principle laid down by this court in its opinion, it was clear that the judgment could not be sustained under the instruction of the trial court to the jury that plaintiff must recover, if at all, upon the theory of performance during the second year. It was, therefore, not necessary to determine—and the court did not determine—anything as to plaintiff's right to recover under the special circumstances affecting the claim for salary for the month of April, 1907. That the court did not intend to pass upon this question, we think is very clear from the opinion.

If there is one principle connected with the doctrine of the "law of the case" that is undisputed, it is that no matter not *expressly* decided upon the former appeal is concluded. In *Wickson v. Devine*, 80 Cal. 388, Judge Beatty said—and the thought is repeated in almost identical language in the case of *Allen v. Bryant*, 155 Cal. 256—that "the doctrine of the law of the case has " nothing to commend it to the favor of the court, and " its application would not be extended beyond the cases " in which it had been held to apply."

In *Mutual Life Ins. Co. v. Hill*, 24 Sup. Ct. 539, Mr. Justice Brewer, delivering the opinion of the Supreme Court, distinguished between the case where, upon a

former appeal, the judgment had been reversed, and where, upon such appeal, it had been affirmed, stating: "The rule is that a judgment of reversal is not necessarily an adjudication of the appellate court of any other than the questions *in terms discussed and decided.*" "As applied to judgments of reversal where new trials are ordered," said the Circuit Court of Appeals for the sixth circuit, in the case of *Taenzler & Company v. Chicago Railway Co.*, 191 Fed. 547, "the rule of conclusiveness is confined to questions actually decided."

See, also,

Sneed v. Osborn, 25 Cal. 629.

Certainly, in the case at bar, it cannot be said that any of the legal propositions arising in this connection, and which are discussed in our brief herein (pp. 32-36), are either "discussed or decided." On the contrary, there was no reference made to them in either the briefs or in the opinion of this Court. For these reasons, we respectfully submit that the "law of the case" does not preclude this Court from investigating the merits of any of the points urged by us to sustain the judgment under the first count. (Brief for Defendant in Error, pp. 32-36.)

Moreover, the doctrine of the law of the case applies "only to principles of law involved in the case and not to mere questions of fact." (*Mitchell v. Davis*, 23 Cal. 383; *Wallace v. Sisson*, 114 Cal. 42.) "If this court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the court

below and cannot prejudice the parties, where a new trial is had. It is upon question of law that the decision of the appellate court becomes the law of the case, and not upon questions of fact." (*Sneed v. Osborn*, 25 Cal. 629, approved in 114 Cal. 43.)

Parties are never concluded by a recital of the facts in the opinion, and upon a new trial, after reversal, it is the duty of the trial court to investigate and determine the facts upon its own responsibility. The trial court, therefore, was not concluded by the statement made in the opinion on the former trial, that plaintiff did not turn over to the companies the premiums "during the second year, but, on the contrary, *from April 1st, 1907, to April 1st, 1908, deducted and retained "from all of such premiums a commission, etc."* (199 Fed. 412) The testimony given by Mr. Conroy at the last trial conclusively showed that the premiums were not due until between 45 and 60 days. The trial court, therefore, was at liberty to determine the fact in this regard in accordance with the evidence before it, unembarrassed by anything said thereon in the opinion.

For the reasons stated, it is respectfully submitted that the "law of the case," as determined upon the former appeal, does not preclude recovery under the first count. Since this brief is filed for the purpose of answering the new authorities and contentions of defendants, set forth in their supplemental brief filed after the argument, we do not consider it appropriate to re-argue here any of the several points relied upon by us to establish plaintiff's right to recover under the first

count. And we, therefore, respectfully submit this branch of the argument upon the argument made in our brief, pages 32 to 36.

GOODFELLOW, EELLS,
MOORE & ORRICK,
Attorneys for Defendant in Error.

No. 2634

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY
(a corporation), ROCHESTER GERMAN
INSURANCE COMPANY (a corpora-
tion), CALEDONIAN AMERICAN IN-
SURANCE COMPANY (a corporation)
and SCOTTISH UNDERWRITERS
(a corporation),

Plaintiffs in Error,

VS.

S. W. LEVY,

Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR
to Defendant in Error's Answer to Supplemental Brief.

T. C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Plaintiffs in Error

Filed this DEC 8 1915 *day of December, 1915.*

F. D. Monckton FRANK D. MONCKTON, *Clerk.*

By *Deputy Clerk.*

No. 2634

IN THE

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CALEDONIAN INSURANCE COMPANY
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tion), CALEDONIAN AMERICAN IN-
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(a corporation),

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

REPLY OF PLAINTIFFS IN ERROR

to Defendant in Error's Answer to Supplemental Brief.

Pursuant to permission granted, this brief is filed in reply to the answer of defendant in error to the supplemental brief of plaintiffs in error. We desire to call the Court's attention to certain matters which we believe conclusively answer the position taken by defendant in error that plaintiffs in error cannot be heard on the merits.

Defendant in error has cited, in the above referred to answering brief, a number of cases tending to support the general rule that, in the absence of an agreed statement of facts, this Court, on a writ of error, will not hear the case on its merits unless the record shows special findings or a motion for a nonsuit.

Without, in detail, going into the facts upon which those cases were decided, we respectfully submit that the present case is clearly distinguishable from them in this: that in those cases there was but one appeal on records which, in most instances, showed a conflict. The writ of error upon which the present appeal is prosecuted is the second writ of error taken out in this same case. The present case has been tried twice, or, rather tried once and submitted for judgment once. Subsequent to the first trial a writ of error was taken to this Court and it was held as a matter of law that there was no question of fact for determination either by a jury or by the Court, holding that the question to be determined was one of law.

The case now comes to this Court upon a second writ of error upon practically the same record with the slight immaterial change in the testimony to which attention has already been called, and which in no way created a conflict. Therefore, the case here, upon practically the same record as on the first appeal, is in a clearly different status from the cases referred to by defendant in error for the reason that the law of the case was fixed upon the

former writ of error when this Court held that there was no question of fact to be determined.

For defendant in error to say that the record does show the transcript of the evidence taken upon the former trial, we have but to call the Court's attention to the transcript, page 68, folio six, where the following language occurs:

“The following is the substance of the evidence at the former trial”.

In addition to the foregoing, we respectfully submit that if this Court should be of the opinion that the submission of the case was not a request for judgment and that the submission under the circumstances outlined was not an agreed statement certainly there is absolutely no answer to the further fact that the record shows in the prayer to the answer (Tr. p. 22, fol. 27) that plaintiffs in error below expressly prayed that defendant in error take nothing by the action and that plaintiffs in error have judgment for their costs of suit. We respectfully submit that a request for judgment contained in such a prayer is of just as much force and has the same legal effect as if such request were made at the submission of the case to the trial Court and that the Court's decision in rendering judgment contrary to such a request can be reviewed.

Dated, San Francisco,
December 24, 1915.

Respectfully submitted,

T. C. VAN NESS,

OTTO IRVING WISE,

Attorneys for Plaintiffs in Error.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY, et al.,
Plaintiffs in Error,

VS.

WILLIAM LEWIS and CLEMENCE L. BLUM, as
executors of the last will and testament of
S. W. LEVY, deceased,
Defendants in Error.

**PETITION FOR A REHEARING ON BEHALF OF
DEFENDANTS IN ERROR.**

GOODFELLOW, EELLS, MOORE & ORRICK,
Insurance Exchange Building, San Francisco,
*Attorneys for Defendants in Error
and Petitioners.*

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY, et al.,
Plaintiffs in Error,

VS.

WILLIAM LEWIS and CLEMENCE L. BLUM, as
executors of the last will and testament of
S. W. LEVY, deceased,
Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF DEFENDANTS IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

On behalf of the defendants in error, William Lewis and Clemence L. Blum, executors of the last will and testament of S. W. Levy, deceased,—who have been substituted as parties herein in the place and stead of Mr. Levy, who died pending the appeal—we respectfully ask a rehearing of this cause.

The opinion of the court—if it be permitted to stand—finally disposes of the litigation without a consideration of the merits and solely upon the ground that the propositions upon which the court below based its judgment “were conclusively and finally determined by this court in its former decision”. Before the court, on this technical ground, shall finally deny relief to defendants in error—for the nature of the opinion rendered does not permit of any further proceedings in the case in the District Court—we respectfully ask that the grounds of the judgment be again examined.

Before taking up the main argument, it is necessary to advert to two preliminary propositions which appear to us to lie at the foundation of the case, but which, we submit with the greatest respect, have not been accorded their true bearing and effect in the opinion which has been filed. These are:

(1) That the cause of action stated in the second count, which is based upon defendant’s *repudiation* of the contract,¹ is an entirely different cause of action from that stated in the third count—which is based upon plaintiff’s *performance* of the contract, and under the settled rule in this State, the

¹ The doctrine that the renunciation by the defendant of an executory contract—as distinguished from a mere failure to perform—gives rise to a cause of action without performance by the plaintiff is well settled. See:

Civil Code, sec. 1440;

Canada etc. Co. v. Flanders, 165 Fed. 323;

Golden Co. v. Rapson Co., 188 Fed. 182;

Hale v. Trout, 35 Cal. 229;

Flinn v. Mowry, 131 Cal. 486;

Pierce v. Tennessee Co., 173 U. S. 1, 12;

Lakeshore Ry. Co. v. Richards, 152 Ill. 590; 30 L. R. A. 33.

proof necessary to support a judgment under one of these counts would not support a judgment under the other.

(2) That upon the first trial and appeal, the second count—the “repudiation count”—was not involved, since the trial court charged the jury that the plaintiff “had elected to rely upon his performance”;^{1a} while upon the last trial and appeal, the third count—which is based upon *performance*—was not involved. *The issues litigated on the two trials and appeals, therefore, were entirely distinct and separate.*

Primarily to a consideration of these points, a word should be said relative to the issues tendered in the various counts of the complaint. The first count has to do only with the salary for the month of April, 1907,² and therefore need not be further considered in this branch of the discussion. The second count states a cause of action to recover damage for defendants’ repudiation of the contract during the period commencing with May 1, 1907, and ending with March 31, 1908, the date of the termination of the contract.³ As matter of inducement and for the purpose of showing the circumstances leading up to the repudiation of the contract, the pleader, in this count, adopts and makes part thereof by reference the allegations of the first

^{1a} 199 Fed. 410.

² Tr. pp. 2-10.

³ Tr. pp. 10-13.

count.⁴ In the third count is set forth the cause of action based upon performance of the contract for the same period covered by the second count, i. e., May 1, 1907, to March 31, 1908.⁵ The third count also adopts the allegations of the first count, and, in addition, certain paragraphs of the second, *but not all of the latter*.⁶ Among those paragraphs of the second count which are not adopted in the third count is the one—which is so essential in the statement of a cause of action for repudiation of a contract⁷—that by the repudiation the plaintiff *sustained damages* in the sum, etc.⁸ The fourth count alleges the payment by plaintiff at the instance and request of defendants, of certain sums representing commissions upon return premiums, and prays for the recovery thereof as upon a *quantum meruit*.

Unlike the rule of procedure which obtains in Washington and in many of the other States, the California law permits the pleading of inconsistent causes of action and defenses, and does not require any election to be made between them.

Rucker v. Hall, 105 Cal. 429;

Stockton etc. Works v. Glen Falls Ins. Co.,
121 Cal. 171;

Van Lue v. Wahrlich-Cornett Co., 12 Cal.
App. 752.

⁴Tr. p. 10.

⁵Tr. pp. 13-15.

⁶Tr. p. 15.

⁷See case cited in note 1.

⁸Tr. pp. 12, 13; par. XIX. As showing that no cause of action for repudiation of the contract is stated in the third count, we refer to the allegation that "notwithstanding such repudiation" plaintiff continued to perform (Tr. p. 10). This was treating the renunciation as *brutum fulmen* (L. R. 16 Q. B. D. 473).

The reason for this rule, as stated in the opinion of Judge Van Fleet—than whom no one is more familiar with questions pertaining to the state law and procedure—is that “it cannot always be definitely known what theory as represented by the different forms of pleading the evidence in its legal effect will sustain, and a party is not required to hazard his rights to recover on a single cast”.⁹ Whatever the reasons for the rule may be, however, the rule itself is definitely established in the jurisprudence of this State.

It is equally clear that under our procedure an allegation of performance of a contract will not be sustained by proof of the waiver of performance,¹⁰ or by such a repudiation of the contract as excuses

⁹ Tr. pp. 86, 87.

¹⁰ The renunciation or repudiation of a contract by one party is said to excuse performance by the other. In *Lake Shore etc. Co. v. Richards* (Ill.), 30 L. R. A. 53, it is said:

“Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party. And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon.”

In *Pierce v. Lukens*, 144 Cal. 400, 401, it is said:

“The general principle is, that a party cannot defend himself on the ground of the non-performance on the other side of conditions whose performance he had already notified the other party would have been nugatory. If he declares himself not bound by the contract, he cannot set up failure in either demand or tender.” (Wharton on Contracts, sec. 995; Civ. Code, sec. 1440.) It was said in *Hills v. Exchange Bank*, 105 U. S. 321: ‘It is a general rule that when tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived, or becomes unnecessary when it is reasonably certain that the offer will be refused, that payment or performance will not be accepted.’”

Gray v. Smith (C. C. A., 9th Cir.), 83 Fed. 825.

performance. "While a sufficient excuse for non-performance," said the Supreme Court of California in *Estate of Warner*, 158 Cal. 445,

"will often confer upon a party the same rights that he would have had upon performance, the distinction between the two remains a substantial one. 'The rule is fundamental', said this court in *Daley v. Russ*, 86 Cal. 114 (24 Pac. 867), 'that the complaint must allege either performance or a valid excuse for non-performance. One is not the same as the other. And if the plaintiff did not perform the contract, but relies upon the consent of the defendants as an excuse, he must set forth the excuse in his complaint.' (See, also, *Pohcim v. Meyers*, 9 Cal. App. 31, 37 (98 Pac. 65); *Seebach v. Kuhn*, 9 Cal. App. 485, (99 Pac. 723). If, as is thus held, a party relying upon an excuse for non-performance must allege his excuse in order to have a basis for proof, it necessarily follows that evidence of such excuse will not support a finding that he has performed."

In *Canada etc. Co. v. Flanders*, 165 Fed. 323, it was said:

"As a matter of pleading, the action for damages for past breaches of particular provisions of the contract is not the equivalent of an action for damages for an anticipated breach of an executory contract, or for damages due to an unlawful renunciation of liability under the contract."

Numerous other authorities declare the same rule. See:

Bailey v. Bond, (C. C. A., 9th Cir.) 77 Fed. 410:

“The facts showing waiver must be pleaded.”

Los Angeles etc. Co. v. Amalgamated etc. Co.,
156 Cal. 778;

Roche v. Baldwin, 135 Cal. 525;

Seebach v. Kuhn, 9 Cal. App. 489.

The foregoing authorities show that a mere breach of contract by defendant, *accompanied* by performance by plaintiff, forms an entirely different cause of action from one made up of a renunciation or repudiation of the contract by defendant, *unaccompanied* by performance by plaintiff, and that a complaint which states one of these causes of action will not admit of proof or sustain a judgment based on the other. This rule was invoked by the defendants insurance companies at the first trial, at whose request the court charged the jury that plaintiff had elected to rely upon performance of the contract. We quote here the following from the charge:

“This is an action under a contract, in which the plaintiff seeks to recover from defendants on account of the breach of the contract by defendants. *In such an action plaintiff must prove either performance on his part of the agreement or that he was prevented from performing by the acts of the defendants. In this action plaintiff has elected to rely upon his performance. Therefore, I instruct you that if, from the evidence, you find that the plaintiff has failed to perform any of the conditions contained in the contract dated March 31, 1906, on his part to be performed, your verdict must be for the defendants in this action.*”¹¹ (199 Fed. 410.)

¹¹ 199 Fed. 410.

The effect of this instruction, it is clear, was to remove the second count entirely from the case.^{11a} It left for determination by the jury the question only whether plaintiff had performed the contract on his part. Under the charge, they could not consider, as a basis for recovery, that the defendants had repudiated the contract. And the plaintiff, in turn—the judgment being in his favor—could not, of course, attack the charge, nor claim that the evidence was sufficient to justify a verdict in his favor under the count based upon the defendants' repudiation of the contract. As said in a somewhat similar case by Judge Van Fleet, delivering the opinion of the Supreme Court of California in *Mattingly v. Pennie*, 105 Cal. 517,

“defendant (who was the respondent on a former appeal) was not entitled to dispute the * * * correctness of the rulings of the court below, or of the theory on which the case had been submitted to the jury. The verdict being in his favor, he could not assign error; and, on plaintiff's appeal, we were bound to assume the correctness of the instructions given at plaintiff's request. Those instructions, whether correct or otherwise, were binding upon the jury; and plaintiff was entitled to a verdict in accordance with those instructions, if the evidence warranted it. (*Emerson v. Santa Clara County*, 40 Cal. 543; *Aguierre v. Alexander*, 58 Cal. 21, 30; *Declez v. Save*, 71 Cal. 522.) On that appeal, therefore, the only question which we could possibly consider as to the sufficiency of the evidence was whether the evidence was sufficient, *under the*

^{11a} The election, if any, made at the first trial, did not, however, preclude plaintiff from relying upon the second count at the second trial (*Agar v. Winslow*, 123 Cal. 590; *Brown v. Fletcher*, 182 Fed. 973).

instructions actually given and not objected to by plaintiff, to have supported a verdict in his favor had one been rendered."

The case at bar came to this court upon a writ of error taken out by the *defendants*. It goes without saying that they made no attack upon the above quoted instruction which had been given at their request—nor were they in any position to make any. In their brief in this court they stated: "*The sole question to be determined by this court is whether or not Mr. Levy performed the contract during the second year of its existence.*"¹² And on page 6 of the brief it was said: "Upon the trial of the action, counsel for defendant in error stated that he intended to proceed upon the theory of performance on the part of Mr. Levy during the second twelve-month period of the contract. In order to establish a cause of action, *it became necessary for Mr. Levy to prove that he had performed all the covenants and conditions of the contract on his part to be performed.*" And in concluding their brief they stated:¹³ "The evidence shows conclusively that he did not perform the contract during the period here sued for, *and that therefore he cannot recover in this action.*"

Nor was this court, upon the first appeal, at all concerned with whether the judgment could be supported upon the ground that defendants had repudiated the contract. If the plaintiff had not per-

¹² Brief for Plaintiffs in Error on 1st appeal, p. 8.

¹³ Brief for Plaintiffs in Error, p. 10.

formed, it was clear under the instructions given to the jury that the case would have to be reversed, regardless of what the evidence as to the repudiation was. Quite consistent with what has been said, there is not a word or line in the opinion relative to the matter of repudiation, but on the contrary it is entirely devoted to a discussion of the proposition that Levy did not perform.

We are now in a position to consider two propositions either of which we believe, should induce the court to grant a rehearing. These propositions are:

1. That the judgment of this court upon the first appeal, being one of reversal, the only matters concluded by the judgment are those which were in terms discussed in the opinion and decided.

2. The issues litigated upon the first trial and appeal were entirely different from those litigated upon the second trial and appeal.

These propositions will now be briefly discussed in the order stated.

I.

**THE JUDGMENT OF THIS COURT UPON THE FIRST APPEAL,
BEING ONE OF REVERSAL, THE ONLY MATTERS CON-
CLUDED BY IT ARE THOSE WHICH WERE IN TERMS DIS-
CUSSED IN THE OPINION AND DECIDED.**

We respectfully submit that in holding that the "law of the case" as determined on the first appeal precludes plaintiff from recovering, the court over-

looked the distinction between the rule applicable to *reversals*, as distinguished from that applicable to *affirmances*. In *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 58 L. Ed., Mr. Justice Brewer delivering the opinion of the Supreme Court thus states the rule:

“While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.”

In *Taenzer & Co. v. Chicago etc. Ry. Co.*, 191 Fed. 547 (certiorari denied by the Supreme Court, 50 L. Ed. 640), the Circuit Court of Appeals for the Sixth Circuit used the following language:

“The rule is too well settled to require more than the merest reference to authority that every question of fact or law which was before a Circuit Court of Appeals upon a writ of error, and decided by its opinion, is conclusively settled both for such court and the court below in further proceedings in the same action, and that the finality of such decision as respects questions actually decided is not affected by the fact that the judgment was one of reversal and direction of new trial. Messenger v. Anderson (C. C. A. 6) 171 Fed. 785, 790, 96 C. C. A.

445. *But, as applied to judgments of reversal where new trials are ordered, the rule of conclusiveness is confined to questions actually decided.*'¹⁴

Certainly, it cannot be said that the judgment of this court on the first appeal "in terms discussed and decided"—to use the language of the Supreme Court in *Mutual etc. Ins. Co. v. Hill*, 193 U. S. 551, 48 Law Ed. 788; 24 Sup. Ct. 538—the question whether recovery could be had because of defendants' repudiation of the contract. Indeed, there is not a word or a line in the opinion on that subject. Not only is this so, but the question was not even indirectly involved, since, as we have pointed out, the jury were charged that plaintiff could recover, if at all, only under the count based upon performance. The indisputable fact is that the sufficiency of the evidence to justify a recovery upon the ground that defendants repudiated the contract never was presented excepting upon the last trial; and the effect of the opinion is to deny defendants in error the right to have this cause of action even considered thereat.

¹⁴ It is frequently said in the decisions that the doctrine of the "law of the case" has "nothing to commend it to the favor of the court and its application will not be extended beyond the cases in which it is held to apply" (Beatty, C. J., in *Wixson v. Devine*, 80 Cal. 389; approved in *Mattingly v. Pennie*, 105 Cal. 517). It is therefore held by the United States Supreme Court that the rule "does not apply to expressions of opinion on matters the disposition of which was not required for the decision" (Field, J., in *Barney v. Winona etc. Co.*, 117 U. S. 228, Law Ed. 858, 860); and that it "should be confined to questions that were **actually considered and decided**, and it should not be extended so as to embrace dicta or intimations contained in an opinion which may be thought to foreshadow the views of the appellate court on other questions (Thayer, C. J., in *Pattillo v. Allen-West etc. Co.*, 108 Fed. 723, 729).

II.

THE ISSUES LITIGATED AT THE FIRST TRIAL AND UPON
THE FIRST APPEAL WERE ENTIRELY DIFFERENT FROM
THOSE LITIGATED AT THE SECOND TRIAL AND UPON THE
SECOND APPEAL.

In the opinion much emphasis is placed upon the proposition that the evidence at the two trials was substantially the same. In point of fact, additional evidence was introduced at the second trial, which we think was very material.¹⁵ Be that as it may, however, the rule is well settled that if *either the issues or the evidence* presented at the second trial differ from those presented at the first, the "law of the case" has no application. In *Flood v. Templeton*, 152 Cal. 158, in which, after the determination of the first appeal, a change was made in the issues, it was said:

"While some allegations of fact are common to both pleadings, additional allegations are contained in the amended answer, presenting a different cause of action from that set forth in the complaint involved on the former appeal and calling for entirely different relief. *The rule of the 'law of the case' is only applicable where the same matters which were determined in the previous appeal are involved in the second appeal.*"

In *Ellis v. Witmer*, 148 Cal. 531—which also involved a change in the issues after judgment in the appellate court—the Supreme Court, speaking through Mr. Justice Shaw, used this language:

¹⁵ We refer to Mr. Conroy's testimony that no demand for the \$1000 per month was made during the second year (Tr. p. 82).

“When on appeal the supreme court remands a case for a new trial or for further proceedings, the law as laid down in its opinion becomes the law of the case, and cannot afterwards be disputed by either of the parties, nor disregarded even by this court, although it may subsequently appear that it was erroneous. But this rule applies to the case, in its subsequent course, only so far as the case then presents the same facts and involves the same principles of law.”

Among the numerous other cases which lay down the same rule, the following may be cited:

Esrey v. Southern Pacific Co., 103 Cal. 547;

Moore v. Trott, 162 Cal. 273;

Gould v. Stafford, 101 Cal. 35.

While it is true that in case at bar the pleadings were not amended after the first reversal, nevertheless the case at the second trial—so far as the point under discussion is concerned—stood in precisely the same position as if the pleading had been amended, for entirely new issues were submitted for decision thereat. As we have pointed out, the effect of the court's charge to the jury at the first trial was to entirely remove from their consideration the cause of action based upon defendants' repudiation of the contract. And at the last trial, in pursuance of the conclusion announced by this court upon the first hearing, no claim was made by plaintiff to recover under the third count.¹⁶

It is, therefore, respectfully submitted that the issues litigated at the two trials and appeals being

¹⁶ Tr. p. 67.

entirely different, the doctrine of the law of the case has no application.

Before concluding this petition, we desire to respectfully call the court's attention to the fact that even if there were no basis whatever for the propositions which have been considered in the preceding pages of this brief, it cannot be successfully claimed that the right to recover under the fourth count was based upon the contract or is affected by the "law of the case". On the contrary, the cause of action therein stated is upon a *quantum meruit*, and we would therefore be entitled to recover thereon entirely apart from the considerations applicable to the contract and which are referred to in the two opinions of the court. Even if there were no other reason, therefore, it is respectfully submitted that a rehearing should be granted, for the reason that though the opinion does not refer to or consider the right of plaintiff to recover under this count, it effectively bars the right of defendants in error to recover thereunder.

With the greatest respect to the court, we submit that enough has been shown to justify a further hearing of the case by the court.

Dated, San Francisco,

May 27, 1916.

Respectfully submitted,

GOODFELLOW, EELLS, MOORE & ORRICK,
*Attorneys for Defendants in Error
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for defendants in error and petitioners herein, and that in my judgment the foregoing petition for a rehearing is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

W. H. ORRICK,
*Of Counsel for Defendants in Error
and Petitioners.*

No. 2635

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. ROBBINS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

BLACK & CLARK,

Attorneys for Plaintiff in Error.

Filed this.....day of November, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2635

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. ROBBINS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error, defendant below, was convicted of the offense of sending an improper letter through the United States mail. He was sentenced to imprisonment at McNeill's Island, for the term of three years, and he is now before this court asking for a new trial by reason of errors in certain rulings upon the admission and rejection of testimony, and upon the misconduct of the United States attorney during the course of the trial.

I.

AS TO THE MISCONDUCT OF THE UNITED STATES ATTORNEY.

Edna M. Rogers was the complaining witness, and upon her cross-examination the following occurred:

“Mr. BLACK. Q. How old a woman are you?

A. 31.

Q. Have you any objection to telling your married name?

Mr. PRESTON. To which we object. It is wholly immaterial whether this woman is a married woman or a single woman, or a divorced woman, either.

The COURT. It does seem to be so at first blush.

Mr. PRESTON. I guess you know all about her. You have had half a dozen detectives out. I guess you know what it was.

Mr. BLACK. We object to that statement and assign it as misconduct, that we have had half a dozen detectives out.

Mr. PRESTON. Well, I can prove that you had two, to my certain knowledge.

The COURT. What was the statement? I didn't hear it.

Mr. BLACK. ‘You have had half a dozen detectives out in this case.’

The COURT. Well, let the jury disregard that. If the lady has no objection to telling her name, I don't know why you should object.

Mr. PRESTON. Oh, I don't object, but I don't see what it has to do with the case. This woman's reputation is not at stake.

Mr. BLACK. I submit it is very largely at stake, as the issue will develop in this case.

The COURT. If the lady has no objection, she can tell it.

A. It don't make any difference to me, only I don't see any good in mixing him up in it.

Mr. BLACK. I won't press the question, if there is any reluctance whatever to answering the question."

The foregoing remarks of the United States attorney were duly objected to and the same are hereby assigned as prejudicial error and misconduct committed against the defendant.

There was no testimony at all, given at the trial, that any detective or detectives had been employed on behalf of the defendant." (Tr. pp. 23, 24.)

Again, the defendant, E. E. Robbins was placed upon the stand, and upon his cross-examination, the following occurred:

"Mr. PRESTON. Q. Your wife stays at home almost constantly, don't she, and some of the children, too?

A. Well, it is very frequently, that we are all gone.

Q. I will ask you if it is not a fact that it is notorious that your wife never goes out with you and that she is always at home?

A. No, sir, that is not true.

Q. *Well, it used to be true.*

Mr. BLACK. I object to that as misconduct.

Mr. PRESTON. I withdraw it.

Mr. BLACK. I assign it as misconduct of the grossest kind.

The COURT. I would not say of the grossest kind. It can hardly be commended. The jury will disregard it.

Mr. PRESTON. I said I knew the doctor quite well, and I do. That is all I said.

Mr. BLACK. That remark is also misconduct.

The COURT. Let us confine ourselves to the testimony given on the witness stand.

The foregoing remarks of the United States attorney were duly excepted to and are hereby

assigned as prejudicial error and misconduct.”
(Tr. pp. 35, 36.)

And again, in his opening argument, the United States attorney, referring to the personal appearance of the defendant, used the following language:

“And, God knows there is nothing in his physical make-up that would appeal to any woman.

Mr. BLACK. We take an exception to the language of the district attorney.

To which remarks of the United States attorney, the defendant then and there duly excepted and hereby assigns the same as prejudicial error and misconduct.” (Tr. pp. 41-42.)

And, again in his closing argument, the United States attorney, used the following language:

“Mr. PRESTON. Has he brought in the typewriter here and allowed it to be demonstrated to you?

Mr. BLACK. I except to those remarks.

Mr. PRESTON. You said, Mr. Black, during the trial of this case you would be willing as a man to have the typewriting machine produced in this case.

The COURT. I think you had better discuss the evidence that was introduced and not the evidence that was not.

To which remarks the defendant then and there duly excepted and hereby assigns the same as prejudicial error and misconduct on the part of the United States attorney.” (Tr. pp. 42, 43.)

And, again in his closing argument, in referring to the defendant's personal appearance, the United States attorney used the following language:

"It is only necessary to look at him (referring to the defendant) to see that lasciviousness crops out in every lineament of his countenance.

To which language exception was then and there duly taken and the defendant now assigns the same as prejudicial error and misconduct on the part of the United States attorney."

It will be seen from the foregoing that the entire conduct of the United States attorney showed a bitterness of feeling entirely out of place in a courtroom, and entirely inconsistent with the judicial attitude which should characterize the actions of a public prosecutor.

When it is considered that it was in effect charged and claimed all through the trial, that the purpose and object of the defendant in writing the so-called "Mary B. Brown" letter was that he might pave the way to undue familiarity with the witness, Edna M. Rogers, the impropriety of the language by the learned district attorney is clearly apparent. He speaks of *his own personal knowledge* following upon the question:

"Q. *Is it not a fact that it is notorious that your wife never goes out with you, and that she is always at home?*"

And when the witness replied in the negative, to have the learned district attorney, with all the force at his command state as a positive fact within his own knowledge: "*Well, it used to be true,*" the prejudice to the defendant cannot be measured.

And after timely objection was made, and after the court said that such language could hardly be

commended, to have the district attorney make matters worse by saying, "I said I knew the *Doctor quite well, and I do*," it is not possible to measure the damage that was done to the defendant in the eyes of the jury.

As to the effect of improper language of the public prosecutor in the presence of the jury, it is well at this point to quote from the case of *People v. Fielding*, 158 N. Y. page 542, reported in 46 L. R. A. page 641:

"Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy, or resentment." (p. 648.)

And again:

"As the admonition of the court has not proved sufficient to prevent improper and dangerous appeals to the prejudice of jurors, it has become necessary, as we think, to rigidly enforce the general rule of this and many other states that requires a reversal whenever the error is raised by a proper exception. Abuse of the defendant by the prosecuting officer in his address to the jury, which was calculated to arouse their passions against him and ma-

terially prejudice him in the trial, has been held such error as would, of itself, cause a reversal. *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585. Where the prosecuting attorney was permitted to comment on the personal appearance of the defendant, not as a witness, nor on account of his manner and bearing as such, but as indicating a probability of guilt, it was deemed sufficient to reverse a judgment of conviction. *Bessette v. State*, 101 Ind. 85. In *Tucker v. Henniker*, 41 N. H. 317, 323, the court said: 'It would seem utterly vain and quite useless to caution jurors, in the progress of a trial, against listening to conversations out of the court room in regard to the merits of a cause, if they are to be permitted to listen in the jury box to statements of facts calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous, and interested counsel. * * * Statements of facts not proved, and comments thereon, are outside of a cause: they stand legally irrelevant to the matter in question, and are therefore not pertinent.'" (p. 649.)

"The harsh and unjust statements of the district attorney were not founded upon evidence, but rested wholly on his unsupported declarations." (p. 653.)

And again the court says in closing its opinion:

"Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law, because he has not had the fair and impartial trial which the law prescribes for a person charged with crime. If we disregard a sound and well established rule in his case because we think he is guilty, we tear down one of the safeguards provided by society for the protection of its citizens, and

the precedent may at some time aid in depriving an innocent man of his liberty or his life."

"Thus, personal abuse of the accused by the prosecuting attorney in a criminal case having nothing whatever to do with the case or the facts and circumstances in proof, and which is calculated to inflame the passions of the jury against him, and the refusal of the court on request to reprimand him, require the reversal of a judgment and conviction therein."

State v. Fischer, 124 Mo. 460;

State v. Bobbst, 131 Mo. 328;

Stone v. State, 22 Tex. App. 185;

State v. Baker, 57 Kan. 571.

The United States attorney in this case violated pretty nearly every principle prescribed by the courts for the fair and orderly conduct of a criminal case. He descended to personal abuse of the defendant in referring to his appearance, not as a witness but as a man, and holding him up as an object of contempt before the jury; he stated as a fact that the defendant had half a dozen detectives hired to spy upon the prosecuting witness. There was no testimony whatever in the case in regard to detectives, and such a statement by the prosecuting attorney would well tend to prejudice the jury against him; and, lastly, the prosecuting attorney commented upon the failure of the defendant to produce his typewriter in court, which was a gross violation of the rules governing the conduct of criminal cases.

The very late case of Myrick v. U. S., 219 Fed. 1 (Circ. Court of App. First Circ.) lays down the

rule that where a defendant takes the witness-stand and confines his testimony to certain matters, he does not thereby waive his constitutional right as to testifying or not testifying upon other matters, and he does not thereby subject himself to criticism or adverse comment at the hands of the district attorney. In discussing this proposition, the court at page 10 of the decision, says:

“The question is therefore presented whether a defendant, when set to the bar for trial before a jury upon two indictments charging different offenses, by taking the stand and limiting his testimony to a particular charge in one of the indictments, waives his constitutional right with reference to the charge contained in the other indictment, so that inferences may be drawn against him from his failure to testify as to any of the matters there charged. It seems to us that to state the question is to answer it; that it was not the intention of Congress, in the enactment of the law authorizing the trial of an accused person for distinct offenses, at the same time, on two or more indictments, to deprive him of his constitutional right not to have inferences drawn against him by reason of his failure to testify upon one indictment, should he see fit to testify to matters charged in the other indictment; and that this is especially true where the indictments are not consolidated by an order of the court, as they were not in this case, but were tried as independent and distinct matters, though before the same jury. *Betts v. U. S.*, 132 Fed. 228, 229, 230, 234, 235, 65 C. C. A. 452.”

It would be hard to find a case where the district attorney has more grievously offended the rules of propriety than in this.

The defendant was and had been a minister of the gospel, in the Methodist Church, for over twenty years. He stood charged with writing and sending through the mail a letter which, though couched in the most carefully chosen language, would well be calculated to excite in the minds of the hearers, and particularly of the jury in listening to the reading of the letter, a feeling of hostility and resentment by reason of the very fact that the defendant, being a minister of the gospel, should not be guilty of offending against good morals, and if he were proven guilty in fact there would be a natural feeling that he should be even more harshly dealt with than the ordinary sinner who makes no great pretensions as to morality and right living.

With the minds of the jurors thus prejudiced against the defendant by the very subject matter of the letter, how dangerous it is, and how violative of every principle of fair play, for the district attorney to comment upon the personal appearance of the defendant, to state as facts matters prejudicial and as to which there was no evidence whatever, and then deliberately to comment upon his failure to produce his typewriter in court, and thus leave the jury to draw the plain inference that the defendant was afraid to produce the typewriter, and that if he had produced the typewriter it would clearly have shown his guilt. Upon this point, alone, therefore, it is respectfully submitted that this court should reverse the judgment and grant to the defendant a new trial.

Another assignment of error we desire particularly to emphasize.

The ninth assignment of error is based upon the refusal of the trial court to permit the defendant to show the reputation of the prosecuting witness as to chastity in the community in which she lived. It was and is contended by the defendant that the character of the recipient of a private sealed letter is a proper matter to bring before the jury. The court refused to allow any inquiry into that subject, basing its refusal upon the case of *United States v. Musgrave*, 160 Fed. 700, which supports the ruling of the trial court.

The defendant relies upon the two cases:

U. S. v. *Wroblenski*, 118 Fed. 495;

U. S. v. *Wyatt*, 122 Fed. 316,

both of which sustain the contention of the defendant that the character of the recipient of a private, sealed letter is a proper matter for the jury to have laid before them.

“The test of obscenity” says the Supreme Court of the United States, “is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a *publication of this sort* may fall.”

“Would it,” the court said, “suggest or convey lewd and lascivious thoughts to the *young and inexperienced?*”

Rosen v. U. S., 161 U. S. (40 L. Ed. 610).

To the same effect is the case of *U. S. v. Bennett*, Fed. Cases No. 14571:

“The test is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall.”

It is respectfully suggested that a wide distinction should be made between the publication of an improper article in a newspaper, or in a book where *any* one may happen to see it, and where such publication may fall into the hands of any one, the most innocent, and a private, sealed letter addressed to a particular individual. If that particular individual is already in such a moral condition, is already so depraved that no communication, of whatsoever character, could have any further corrupting influence upon the mind of the recipient, it would seem reasonable that the jury should be advised of that fact, in order to determine the intent and purpose of the sender of the sealed letter in question.

We think, therefore, that it was error to keep from the jury knowledge of the real character of the prosecuting witness in this case.

In the Wroblenski case cited above, at page 496, the court says:

“In the case of a private letter (sealed) there is no publication (U. S. v. Chase, 135 U. S. 255), and no presumption arises of intention to give publicity, or that it *will be read by others than the addressee*. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to *other persons*. So the inquiry as to the

tendency of the letter must be narrowed to its liability *to corrupt the addressee.*"

The defendant stood ready to show that the character of the addressee was extremely bad,—so bad that such a letter falling into her hands could not possibly have had any injurious effect upon her mind and character, and while he denied writing the letter, yet, for the sake of the argument, if it were admitted that he did write the letter, that should not deprive him of the right to show that such a letter could not "corrupt the morals" of such an addressee.

The case of *U. S. v. Wyatt*, above cited, follows the same line of reasoning as is found in the *Wroblenski* case, and it remains for this court to determine whether any distinction should be made between an open publication which all may read, and a private, sealed letter which the recipient alone is presumed to read.

It is respectfully submitted that the better reason and more just rule are to be found in the cases making the distinction. It cannot be in the nature of things that the same test should be applied to a sealed letter, addressed to a woman of notorious character, as to an open publication in a newspaper or book which all persons may read, and which may fall into the hands of the most innocent.

The second assignment of error concerned the identity of one of the women who was stated by

the complaining witness to be Mrs. Estelle W. Kirk, who was concealed in the house of the complaining witness when defendant called upon her. Upon being asked as to whether her name was "Eva Estelle" objection was made, and the court sustained the objection. We fail to see any reason for this ruling.

The defendant was certainly entitled to the fullest possible information concerning the identity of women who were eavesdroppers at a conversation in which the defendant was supposed to have taken part, and the jury were certainly entitled to know who the women were with whom the complaining witness was associating, and who no doubt were assisting her in an effort to entrap the defendant into making statements or admissions which could be used against him.

The fifth assignment of error is based upon the ruling of the court in sustaining the objection to the question propounded to W. C. Hill, a witness for the Government, as to where he had seen the defendant standing on a public street in the City of Salinas. We fail to see the materiality of the testimony attempted to be elicited or what bearing the action of the defendant in standing upon any corner of any street in Salinas could have upon the alleged offense of mailing an improper letter, months before the incident of "standing upon the street", about which inquiry was thus being made.

The offense, if any, had been entirely completed and the only purpose of the testimony sought to be elicited was to prejudice the defendant in the eyes of the jury. The purpose was undoubtedly to show that the defendant was endeavoring to force his attentions upon the complaining witness, and even if such were the fact, and however reprehensible his conduct might be, considering his position in society, that is not the offense for which he was being tried, and in this connection the language of this court in the case of *Dwinnel v. U. S.*, 186 Fed. at page 759, is apposite:

“However fraudulent the acts of the parties in respect to the relinquishment referred to, *they do not constitute the crime alleged in the indictment.*”

Paraphrasing that language, we may say: “However reprehensible such conduct might have been (assuming for the sake of the argument that it could be proven) it was not the crime alleged in the indictment.”

The attempt to show an effort to force his attentions upon the complaining witness, considering the standing and position of the defendant, in the community, even if there had not been the slightest foundation for such an attempt, could not but be highly prejudicial to the defendant.

The seventh assignment of error is based upon the court's ruling in sustaining the objection of

the United States attorney to the question propounded to the witness Mary L. Wickes, as follows:

“Q. Are you able to give the exact words she said to Mrs. Conklin?”

By this question, it was sought to be shown that the prosecuting witness had given an entirely different reason for quitting the Bible class started by the defendant in his church from that which she had given in her testimony upon the witness stand, and when permission was asked to recall the complaining witness for the purpose of asking her if she had not, in fact, said to the witness Mrs. Wickes:

“I am not going to the Bible class any more, my aunt has one of her damned cranky spells on. Thank God it will not last a long time.”

The court denied the motion that the complaining witness should be recalled, to which ruling the defendant excepted, and assigns the same as error.

The complaining witness having stated that she left the Bible class because the defendant was endeavoring to force his attentions upon her, we cannot see why it was not entirely proper to show that she had given an entirely different reason for so leaving the class, and it is respectfully submitted that the court committed error in refusing the defendant's request so to show.

Upon the entire record, it is respectfully submitted that the defendant is entitled to a reversal of the judgment and a new trial.

Dated, San Francisco,

November 1, 1915.

BLACK & CLARK,
Attorneys for Plaintiff in Error.

No. 2635

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. ROBBINS,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

JOHN W. PRESTON,

United States Attorney,

Attorney for Defendant in Error.

Filed this.....day of February, 1916.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

Filed

FEB 10 1916

SHANNON-COHMY, 509 SANSOME ST.

F. D. Monckton,

No. 2635

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. ROBBINS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

The plaintiff in error was convicted of sending an obscene letter through the mails and sentenced to three years in the penitentiary. Counsel for appellant assign as their main ground for reversal, the supposed misconduct of the District Attorney in addressing to the Jury certain alledgedly improper remarks and statements during the course of his argument, and also other remarks made to the complaining witness and the defendant, while they were on the stand.

In the brief of the appellant the proceedings surrounding the alleged misconduct are set forth, and it will be sufficient to refer to the page of the

brief and the specific remarks without setting forth at length the entire excerpts from the reporter's transcript contained in their brief.

On page 2 is found the following:

"Mr. Preston: I guess you know all about her. You have half a dozen detectives out. I guess you know what it was.

"Mr. Black: We object to that statement and assign it as misconduct, that we have half a dozen detectives out.

"The Court: Well let the jury disregard that," etc.

On cross-examination of the defendant the following occurred:

"Mr. Preston: I will ask you if it is not a fact that it is notorious that your wife never goes out with you and that she is always at home?

A. No sir, that is not true.

Q. Well, it used to be true.

Mr. Black: I object to that as misconduct.

Mr. Preston: I withdraw it.

Mr. Black: I assign it as misconduct of the grossest kind.

The Court: I would hardly say of the grossest kind. It can hardly be commended. *The jury will disregard it.*

Mr. Preston: I said I know the doctor quite well and I do. That is all I said.

The Court: Let us confine ourselves to the testimony given on the witness stand."

On page 4:

"The District Attorney: And God knows there is nothing in his physical makeup that would appeal to any woman.

Mr. Black: I except to those remarks."

Again, in the closing argument, quoted on page 5 of appellant's brief:

"Mr. Preston: It is only necessary to look at him to see that lasciviousness crops out in every lineament of his countenance.

Mr. Black: We take an exception to the language of the District Attorney."

ARGUMENT

ALLEGED MISCONDUCT OF DISTRICT ATTORNEY

The plaintiff in error relies mainly upon this alleged misconduct of the District Attorney to secure a reversal of the judgment and the granting of a new trial. It will be seen from a reading of the excerpts from the record contained in brief of plaintiff in error, that the alleged improper remarks merely called forth from the defense an objection or exception to the language used or the statement expressed. At no time during the course of the trial was an attempt made to have the so-called objectionable remarks withdrawn from the jury and the harm, if any, cured.

The rule is, as it properly should be, that the trial Court is the proper tribunal to look to for the protection against misconduct by the District

Attorney, and it is only in the event that a request to the Court to instruct the jury to disregard the statements, is refused, or the attorney persists in his remarks after being cautioned by the Court to cease, that legal objections will lie, and even then a reversal will not be granted unless the remarks were so prejudicial that the jury *must* have been influenced thereby. If the evidence was sufficient to warrant a jury in returning a verdict of guilty, and it cannot be shown with any certainty that the prejudicial remarks influenced the jury, it will not be ground for reversal that the remarks were improper. This is especially true if the Court has instructed the jury to disregard the remarks, or they are withdrawn by the one making the remarks.

If improper remarks or statements, objected to in the proper manner, are not ground for reversal if it can be shown that, although improper, they have not affected the verdict, it follows that the Appellate Court should not even be attentive to a complaint of misconduct when the record, as in this case, shows the remarks could not have been injurious, and especially so in view of the fact that no attempt to remedy the harm alleged to have been done by such misconduct, was made at the time and in the manner prescribed by the required procedure in such cases.

In this case the Court expressly instructed the jury to disregard the remarks made by the prosecutor about the detectives.

The remark made about the failure of the defendant to ever take his wife out with him was immediately withdrawn by the District Attorney himself, and the Court also expressly instructed the jury to disregard it.

In *Dunlop vs. United States*, 165 U. S. 486-498, 41 Law. Ed. 799, the Court said:

“The action of the court was commendable in this particular, and we think this ruling and the immediate withdrawal of the remark by the District Attorney, condoned his error in making it, if his error should be deemed prejudicial error.”

The other remarks assigned herein as misconduct were not persisted in after the attention of the District Attorney was called to them, and we believe this would show, if they were improper, that they were made inadvertently during the excitement of trial, and were not prejudicial to the defendant, or in the slightest degree whatever swayed the minds of the jury in the matter of their verdict.

On page 490, Vol. 2 of the Enclopedia of U. S. Supreme Court Reports, the following appears:

“Every remark made by counsel outside of the testimony is not ground for reversal. If such was true comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial even the most experienced of counsel are occasionally carried away by this temptation.”

Conceding, for the sake of argument, that the remarks were improper, still they cannot be relied upon at this late day to subject the verdict to reversal. The defense was privileged to object to the remarks during the course of the trial, in the regular manner, and have them made ineffective by requesting the Court to instruct the jury to disregard them and not to take them into consideration when deliberating upon their verdict, and, if through ignorance or inadvertence, the defense failed to take advantage of misconduct by proper appeal to the trial Court, it is now too late to rely upon this alleged misconduct of the District Attorney as a ground for reversal.

In *People vs. Amer*, 8 Cal. App. 137, at page 142, the Court, referring to a statement made by the prosecuting attorney during the course of the trial, said:

“If the defendant was dissatisfied with said comment he should have requested the court to instruct the jury to disregard it. He contented himself, however, with a simple objection to the remark, and the language of the court in *People vs. Ye Foo*, 4 Cal. App. 730 (89 Pac. 450), is applicable here: ‘The court was not asked to strike out the objectionable remarks nor does it appear that the court ruled on an exception. *It is but fair to require defendant’s attorney, in case of objectionable remarks by the district attorney, to call the court’s attention to them then and there and invoke the aid of the court to prevent the remarks from injuring the defendant before he will be allowed*

to urge the matter as error in this court. In such case the court will not hold the remark error upon which to reverse the case,' People vs. Shears, 133 Cal. 159 (65 Pac. 295); People vs. Beaver, 83 Cal. 419 (23 Pac. 321), People vs. Ah Fook, 64 Cal. 383 (1 Pac. 347); People vs. Kramer, 117 Cal. 650 (49 Pac. 842); Lunsford vs. Dietrich, 93 Ala. 565 (30 Ann. St. Rep. 79, 9 South. 308)."

(Italics our own.)

In *People vs. Babcock*, 160 Cal. 537, at p. 545, the Court in reviewing certain improper remarks made by the prosecuting attorney, said:

"Furthermore, defendant is in no position to avail himself of misconduct of the district attorney in this matter. *He in no way invoked any action on the part of the trial court to obviate the effect of the statement, and the statement was of such a nature that any improper effect could have been avoided. He simply noted an exception to the remarks of the district attorney, as was the case in People vs. Sherer, 133 Cal. 159 (65 Pac. 295), where the district attorney made an improper statement. This court said: 'This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury that it was improper, and to disregard it. He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney,' and the judgment was affirmed.*"

(Italics our own.)

In *Moore vs. State* (Court of Criminal Appeals of Texas), 70 S. W. 89, the Court, in speaking of

certain statements made by the district attorney during the course of his argument, said:

“At any rate, there was no requested charge on the part of appellant’s counsel to have the court instruct the jury to disregard said argument; and in the absence of such request and refusal by the judge, and bill of exceptions reserved thereto, the language here used is not of that character authorizing a reversal.”

In *State vs. Regan*, 36 Pac. 472, the rule laid down is in accordance with that laid down in the preceding cases. It is as follows:

“Counsel for defendant excepted to it, but it does not appear that he moved to strike it out, or asked the court to instruct the jury to disregard it. Consequently, there is no foundation for any error in the premises.”

We believe the rule laid down in the above cases was most clearly stated by this Court itself, in the recently decided cases of *Diggs vs. United States*, and *Caminetti vs. United States*, reported in 220 Fed. 545. This Court, at page 556, said:

“It is the general rule that improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, unless the court has been requested to instruct the jury to disregard them, and has refused to do so. 12 Cyc. 585. In *People vs. Shears*, 133 Cal. 154 (65 Pac. 295), it was held that, where the defendant did not invoke the action of the court to instruct the jury that it was improper, and to disregard it, but merely excepted to remarks of the district attorney, the

impropriety is not ground for reversal of the judgment, upon conviction of manslaughter. A similar ruling was made in *People vs. Babcock*, 160 Cal. 537, 117 Pac. 549."

We respectfully submit to this Court a comparison of the present case with the Diggs-Camionetti cases, and also other cases cited or quoted from in point seven of the above-mentioned Diggs case, beginning on page 555 of Vol. 20 Fed. Rep. It will not require a close scrutiny to see that the remarks made in this case were of the mildest when compared with the remarks of counsel in the Diggs case, and especially in the Chadwick case. It therefore will follow that, if there was not sufficient cause to grant a reversal on this point in the Diggs case, it will avail naught for the plaintiff in error herein to rely upon these few innoxious isolated remarks or statements as grounds for reversal.

The case of *People vs. Fielding*, cited on page 6 of brief of plaintiff in error, and from which they quote at great length, is not quite in point in the present instance. In that case there was the most wilful misconduct on the part of the prosecuting attorney, and his remarks were flagrant and persistent. To compare a case of that character where the remarks were obviously prejudicial and persisted in after caution by the judge, with this case where the remarks were not only not prejudicial, but were isolated statements or questions made during the course of the trial, and were stopped once

attention was called to them, is, to say the least, rather far fetched.

A motion for a new trial was denied the plaintiff herein. As the trial judge has the best chance to weigh the improper remarks and to judge their effect on the jury, it is to be presumed that the remarks made by the district attorney in this case were not prejudicial to the defendant or the Court would have granted a new trial.

In *People vs. Conley*, 64 N. W. 325, at p. 326, the Court, speaking of improper remarks of counsel, said:

“Ordinarily these matters must be left to the sound discretion of the trial judge, who hears the entire argument of counsel, and can better judge whether the language is justified by the argument of opposing counsel. *Courts of last resort will interfere by granting a new trial only in a case where the prosecuting attorney has so clearly departed from the evidence and the line of legitimate argument, that any reasonable person will conclude that the jury was prejudiced by it.*” (Italics our own.)

The record in this case shows that there was ample evidence to warrant the jury in finding the defendant guilty, and that the jury could not have been influenced by the so-called improper remarks or questions of the district attorney, and we further contend there is no ground for reversal since counsel did not proceed in the proper manner to have the remarks taken from the jury, and thereby

minimize any ill effects they might have created in the jurors' minds.

On page 8 of their brief, counsel for plaintiff in error quote from the recently decided case of *Myrick vs. United States*, 219 Fed. Rep. 1, in order to sustain their contention that, a defendant voluntarily going upon the stand, does not thereby waive his constitutional privilege of testifying or not testifying so as to allow the prosecutor to comment upon, or criticise his refusal to testify to other matters within his knowledge.

On this point we believe it is sufficient to refer the Court to their decision upon this very same point in the Diggs case, which was decided two months after the Myrick case, and which takes the diametrically opposite view. As this Court has gone very fully into the question as shown by that portion of their able opinion on pages 547 to 551, we believe it would be mere surplusage, besides being presumptuous, to try to further elongate this Court's argument that a defendant appearing upon the witness stand in his own behalf, subjects his failure to testify to other matters, to comment and criticism.

In closing this discussion on misconduct, we would like to call the Court's attention to an excellent monographic note on the subject, appended to the decision of *People vs. Fielding (supra)*, upon which case the counsel for plaintiff in error place so

much stress. If counsel had read this note we do not think they would show so much inclination to charge misconduct in the present instance, realizing from the reading of said note that the grounds upon which misconduct in the present instance were based were most trivial, and likewise that their time to object to such misconduct was during the trial, and not upon appeal.

**PRIVATE SEALED LETTERS, AND THE CHARACTER OF
THEIR ADDRESSEE**

Counsel for plaintiff in error base their ninth assignment of error upon the refusal of the trial Court to allow the defendant to show the alleged bad reputation of the recipient of the letter in this case.

Although they seemingly do not contend that an obscene letter should be tested as much by the character of the recipient, as by the contents of the letter itself, yet this necessarily follows from the position taken by them in contending that the character of the person receiving the letter is something for the jury to inquire into along with the letter itself. That this really is their position is further shown by the citing of the cases of *United States vs. Wroblenski*, 118 Fed. 495, and *United States vs. Wyatt*, 122 Fed. 316.

In other words, the contention is, that the offense charged in the indictment consists, not alone in the character of the letter mailed, but also in the char-

acter of the recipient of such missive, and, if the one receiving the letter is already so immoral and corrupt that the contents of the letter can make no *appreciable* difference in her moral status, then no offense is committed as contemplated by Section 211 of the Federal Penal Code.

Section 211 provides that "Every obscene, lewd, or lascivious book, pamphlet, * * * letter, * * * writing, * * * or other publication of an indecent character, * * * shall be nonmailable." Congress, in enacting this section, was not exercising a police power, but was acting under the power granted to it by Section 8, Article I, of the Constitution "to establish post offices and post roads." Under this section, Congress has the power to say what shall and what shall not be carried by the mails. It can arbitrarily declare what is mailable and what is nonmailable without reference to the public morals or public convenience, and no court will question the validity of its acts because they do not seem consonant with the public good.

"If the use of the mails is a privilege which may be granted or withheld by Congress, Congress has the power to determine what shall be carried and what excluded. In the exercise of that power it has excluded explosives, liquids of various kinds, insect pests, except for scientific purposes, packages weighing over four pounds and many other articles. In determining that question Congress does not act for the protection of the rights of individuals merely; this has been wisely left to the states

by the national Constitution.” (*U. S. vs. Musgrave*, 160 Fed. 700.)

Counsel for the plaintiff in error herein, together with the judges in the Wroblenski and Wyatt cases cited by them, are laboring under the delusion that Congress in enacting this statute, was endeavoring merely to prevent those already pure in mind from being corrupted, and not that “the primary object of this statute is to protect the mails from corrupt communications,” and “The incidental purpose of the law is to protect public morals. (*DeGignac vs. United States*, 133 Fed. 197).

We do not see how the courts in the Wroblenski and Wyatt cases could discover any ambiguity in the intent and meaning of this section, so as to find it necessary to explain or construe it by saying that the character of the recipient of a letter was subject to inquiry by the jury in order to determine whether the letter was obscene or not. They were evidently of the impression that its primary intent was to protect the morals of those into whose hands these things would fall. We admit that this must have been one of the important reasons why the act was passed, but we nevertheless insist that its primary intent was to bar all obscene letters, literature, etc. from the mails because they were bad *per se*, and regardless of the effects they might have on particular individuals.

Congress has seen fit to bar all intoxicating liquors from the mails, and if we are to carry out the argument of the opposing counsel to its logical conclusion, it would follow that the mailing of a bottle of whiskey does not alone constitute a violation of the postal laws, but the test would be whether the recipient is or is not already in such an alcoholic state that the liquor cannot affect him. This will show the utter absurdity of their contention.

“That the sole object of the act was not for the purpose of preventing the corruption of the minds of those to whom the letters or papers are sent and who are susceptible to such corruption is fully shown by the fact that it has been the uniform rule of the courts that communications of that nature addressed to government officials who, suspecting that the defendants are engaged in sending obscene literature through the mails sought information from them under assumed names by the use of what is commonly called ‘decoy letters’ are violations of the statute.”

The term “obscene” is to be defined by seeking for its ordinary and general meaning, as understood by the public at large, and not by a construction placed upon it by using the standard of measurement of a particular person. This being so, it was proper for the trial Court to refuse to allow the defendant to bring the character of the addressee before the jury, but to test the obscenity of the letter by its contents alone, they being

sufficient on its face to bring it within the ordinary meaning and acceptance of the term "obscene."

In the case of *United States vs. Musgrave*, 160 Fed. 700, the Court reviews all the authorities and refuses to follow the *Wroblenski* case, and holds

"* * * that the object of Congress in enacting the statute was to absolutely prohibit the use of the mails to all persons for the transmission of matters which were lewd, lascivious, or indecent. It matters not what the relationship between sender and sendee is, or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try the case, have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute. In the language of Judge Phillips in *United States vs. Harmon* (D. C.) 45 Fed. 417:

" 'Laws of this character are made for society in the aggregate and not in particular. So, while there may be individuals and societies of men and women of peculiar notions and idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or decency is to be tested. Rather is the test, what is the judgment of the

aggregate sense of the community reached by it?" "

And in the Wyatt case relied upon by the plaintiff in error, we find the Court saying:

"Everyone who uses the mails of the United States for carrying letters or other purposes must take notice what in this enlightened age is meant by decency, purity and chastity, and what must be deemed obscene, lewd and lascivious." (*U. S. vs. Wyatt*, 122 Fed. 316, at page 317.)

See also

U. S. vs. Lamkin, 73 Fed. 459;

U. S. vs. Moore, 129 Fed. 159.

Plaintiff in error also contends that a distinction should be made between a private, sealed letter which one may read, and an open publication, which all may read.

We respectfully submit that there is no reason for such a distinction. When Section 3893 of the Revised Statutes was amended in 1888, so as to include "letters," there was some doubt whether or not a private, sealed letter was intended to be included, or whether it was intended that a letter which amounted to a publication was only to be within the statute.

This doubt was settled by the following cases, which held that a private, sealed letter was brought

within the inhibition of the statute by the amendment of 1888:

U. S. vs. Chase, 135 U. S. 255, 34 L. Ed. 117;
Grimm vs. U. S., 156 U. S. 604, 39 L. Ed. 550;
Andrews vs. U. S., 162 U. S. 420, 424, 40 L.
 Ed. 1023;

U. S. vs. Andrews, 38 Fed. 861;

U. S. vs. Gaylord, 17 Fed. 438;

and numerous other cases.

Section 211 of the Federal Penal Code is a complete re-enactment of Section 3893 of the Revised Statutes as amended.

It therefore follows, that if a private, sealed letter obscene in character, is prohibited by Section 211 from being deposited in the mails, anyone violating this section in this regard is deemed guilty, irrespective of the fact that such a letter will do less harm than would an obscene magazine or book. The section makes no distinction between one who mails an obscene letter, and one who mails an obscene periodical. How then can counsel for the plaintiff in error, with any show of reason, ask that a different test be applied in the case of one sending a private, sealed letter, and one sending a book or other publication? We do not see how the opposing counsel could—and we believe this Court will be unable to see it themselves—find any reason for reading into this section something which is

not there, and which Congress never intended to be there, or else they would, it is reasonable to presume, have expressly inserted it therein, viz: that a person sending an obscene private, sealed letter, shall be deemed less guilty than one who sends an obscene book or newspaper through the mails.

The trial Judge, unconsciously swayed by the effect a private sealed letter and an obscene book might have, will undoubtedly, in passing sentence, make the punishment greater or less as the case may be. But this is as near as one should ever get in differentiating between the two. In the eyes of the law, the two are placed on an equal plane and it is immaterial as far as the person's guilt is concerned, whether he sent an obscene notorious newspaper or a foul, obscene, private, sealed letter.

The seventh assignment of error is based upon the trial Court's ruling sustaining the objection of the United States attorney to a question put to a witness in order to impeach the complaining witness and the refusal of the trial Court to allow the recall of the complaining witness.

This is not appealable error, it being within the discretion of the Court to say whether the witness should be recalled or not.

If the defendant wished to impeach the complaining witness, he should have laid the proper foundation for such impeachment while the witness was upon the stand.

“The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it.” (*The Charles Morgan vs. Kouns*, 115 U. S. 69, 9 L. Ed. 316, 319.)

“* * * before those former declarations can be used to impeach or contradict a witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it. or make an explanation intending to reconcile what he formerly said with what he is now testifying.” (*Ayres vs. Watson*, 132 U. S. 394, 34 L. Ed. 378, 381.)

“This rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. * * * The rule is as generally established in this country as in England.” (*Conrad vs. Griffey*, 16 How. 38, 14 L. Ed. 835, 839.)

See also the following cases:

Mattox vs. U. S., 156 U. S. 246, 39 L. Ed. 412;

Clary vs. Hardeville Brick Co., 100 Fed 918;

Gregory etc. vs. Starr, 141 U. S. 222, 35 L. Ed. 715;

Michigan F. & M. Ins Co. vs. Wich, 8 Colo. App. 418, 46 Pac. 687;

and numerous other cases.

The trial judge has the discretion to allow a witness to be recalled or not, in order to lay a proper foundation for his impeachment, and even though the request is reasonable, the refusal to grant it is not reviewable by the Appellate Court.

In the case of *People vs. Shaw*, 111 Cal. 171, where the circumstances were very similar to the present question, the Court said:

“The request was certainly not an unreasonable one; and we apprehend that most courts would have allowed it. *But it was a matter of discretion of the trial court, * * * *.*”

The trial judge has the discretion to determine whether a witness shall be recalled.

Greenleaf on Evidence, Vol. 1, Sec. 445,
16 Ed.;

Jones on Evidence, Vol. 5, Sec. 814, and cases
there cited;

Jones on Evidence, Sec. 825;

Jones on Evidence, Sec. 846 (part of p. 850).

Even in this case, if the request of the defendant was reasonable, it was within the discretion of the Court to refuse it, and such refusal is not ground for appeal, and the counsel for plaintiff in error do not even suggest that such refusal showed that the discretion was in any way abused.

We fail to see any merit in either the second or the fifth assignment of error, and pass over them without further comment.

We respectfully submit there is nothing in the record entitling the plaintiff in error to a reversal of the judgment and a new trial.

Dated, February 7, 1916.

JOHN W. PRESTON,
United States Attorney,
Attorney for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, and PAUL BANCROFT, GUIDO E. CAGLIERI, ANDREW J. GALLAGHER, GEORGE E. GALLAGHER, A. H. GIANNINI, J. EMMET HAYDEN, FRED L. HILMER, OSCAR HOCKS, THOMAS JENNINGS, ADOLF KOSHLAND, BYRON MAUZY, RALPH McLERAN, CHARLES A. MURDOCK, WILLIAM H. McCARTHY, DANIEL C. MURPHY, EDWARD I. NOLAN, HENRY PAYOT, and ALEX. T. VOGELSANG, Members of and Constituting the Board of Supervisors of the City and County of San Francisco, and JAMES ROLPH, JR., Mayor of Said City and County of San Francisco,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed

AUG 26 1915

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors.....	22
Bond on Appeal.....	29
Certificate of Clerk U. S. District Court to Record on Appeal	34
Citation on Appeal (Original).....	35
Notice of Motion, for Order Directing Payment of Taxes, etc.	1
Opinion (Oral)	4
Order Extending Time to August 21, 1915, to File Record and to Docket Cause.....	38
Order Granting Motion for Payment of Taxes..	3
Order Permitting an Appeal and Fixing Amount of Cost Bond on Appeal.....	27
Petition for Allowance of Appeal.....	20
Praeipie for Transcript of Record.....	33
Stipulation as to Facts.....	7

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 21.

Division No. 2.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

**Notice of Motion [for Order Directing Payment of
Taxes, etc.].**

To Pacific Telephone and Telegraph Company,
Plaintiff in Above-entitled Action and to
Messrs. Pillsbury, Madison and Sutro, Plain-
tiff's Attorneys; To Bank of California, Na-
tional Association of San Francisco, Receiver
and Depositary of Moneys Impounded in the
Above-entitled Action:

You and each of you will please take notice that
on Monday, the 11th day of January, 1915, at the
hour of 10 o'clock A. M. or as soon thereafter as
counsel can be heard in the courtroom of the above-
entitled court and division, Postoffice Building, San
Francisco, California, the undersigned will make a
motion for an order directing the payment of taxes
and accrued penalties for delinquency, on the
moneys impounded in said action, for the fiscal year
1914-15.

Said motion will be based upon this notice, upon the files, papers and proceedings in said action, upon the [1*] affidavit of Edward F. Bryant, Tax Collector of the City and County of San Francisco, a copy of which is served herewith, and upon the further grounds that said taxes are now due and wholly unpaid, and that by reason of said nonpayment a penalty of 15% was added thereto by operation of law on the last Monday in November, 1914.

PERCY V. LONG,

City Attorney, Attorney for Tax Collector.

Dated: January 4, 1915.

Receipt of a copy of within original is hereby admitted this 4th day of January, 1915.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

THE BANK OF CALIFORNIA, National
Association,

I. F. MOULTON.

[Endorsed]: Filed Jan. 4, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 15th day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

*Page-number appearing at foot of page of original certified Record.

No. 21.

THE PACIFIC TELEPHONE & TELEGRAPH
CO.

vs.

THE CITY AND COUNTY OF SAN FRANCISCO
et al.

Order Granting Motion for Payment of Taxes.

The motion of the tax collector of the City and County of San Francisco for an order directing the payment of taxes and accrued penalties for delinquency, on the moneys impounded herein for the fiscal year 1914-1915; heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion thereon, it was ordered that said motion be and the same is hereby granted.

[3]

*In the District Court of the United States, Northern
District of California, Second Division.*

EQUITY—No. 21.

Hon. WM. C. VAN FLEET, Judge.

PACIFIC TELEPHONE & TELEGRAPH CO.,
Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant.

Monday, February 15, 1915.

H. D. PILLSBURY and PILLSBURY, MADISON & SUTRO, for Plaintiff.

PERCY V. LONG, City Attorney, and ROBERT M. SEARLS, Assistant City Attorney, for Defendant.

[Opinion (Oral).]

The COURT (Orally):

This is an application by the tax collector of the City and County of San Francisco that the receiver or depositary of the fund under the control of the Court in the above-entitled case be directed to pay the taxes accrued thereon.

I am unable to distinguish the case in its circumstances in any material respect from that arising on similar application recently made in the Spring Valley Cases. The fund is one which is being accumulated in the hands of the depositary bank under and by virtue of a restraining order issued in an action to have a rate-fixing ordinance avoided and held confiscatory; the order providing for a suspension of the enforcement of that ordinance during the pendency of the action, and directing that if the plaintiff collects a larger rate than that provided for in the ordinance involved the excess shall be impounded in the hands of a Special Master and kept in a depositary subject to the final determination of the litigation. The fund has been accumulating for some [3-a] time and is a considerable one,—something over \$200,000,—and the tax collector has, as in the Spring Valley Cases, returned it for assessment against the bank as receiver or depositary. I

am satisfied that it falls within the same principle that was held applicable in the Spring Valley Cases; that it is, within the provisions of the Political Code, moneys in the hands of the Court involved in litigation, and as such subject to taxation as therein provided. I held in those cases that the fund was not the property of either of the parties to the litigation other than potentially so, the title being *sub-judice*. It is a fund accumulated under the circumstances indicated and its destination is wholly subject to the final determination of the Court—that is, as to whether it is justly the property of the plaintiff or that of the consumers. It is, strictly speaking, property in litigation, and its eventual disposition and ownership cannot be determined until the final decree. But the money is nevertheless subject to taxation; it is within the district; it is a part of the property locally within the City and County of San Francisco which should pay its portion of the municipal taxes, and therefore the tax has been properly levied.

There is but one feature tending to create a distinction between the situation here and that which obtained in the Spring Valley Cases, and that is disclosed in an affidavit on behalf of the plaintiff showing that the amount of this fund has been included by it in its returns to the State for the present year for taxation purposes as a part of its gross revenue, and that consequently if this tax is permitted to prevail it will in effect be double taxation. But I am satisfied, for the reasons stated, that the fund [3-b] cannot be regarded as a part of the gross re-

ceipts of the plaintiff. However it may have been regarded by it, it is not the property of the plaintiff, and cannot now be regarded as such for the purposes of taxation; and therefore if it be true that it has been returned as a part of the gross earnings of the plaintiff it has been erroneously so returned and that fact cannot and should not affect the right of the city and county to have it listed and assessed as property subject to taxation within the municipality. If it results, as claimed, in subjecting it to double taxation by reason of the error in making such return, the plaintiff's remedy, if it eventually be determined to be its property, will be by such method as is open to have the injustice corrected, which it is not necessary to here determine.

Nor is it in any sense a tax against the bank; it is a tax against the fund. The bank is merely the instrumentality through which the fund is being preserved and held.

The application will be granted.

[Endorsed]: Filed July 6, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [3-c]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Complainant,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation et al.,

Respondents.

Stipulation as to Facts.

For the purposes of the determination of the application of the city attorney of the City and County of San Francisco, State of California, as attorney for the tax collector of said city and county, notice of which was given on or about the 28th day of November, 1914, for an order of the above-entitled Court directing the payment of the taxes levied and assessed against The Bank of California, National Association, as receiver and depository of moneys in litigation in the above-entitled suit, complainant and respondents in the above-entitled action, and the said city attorney as attorney for the said tax collector, hereby stipulate and agree that the following are the material facts in the determination of said application, and that said application may be heard and determined on this stipulation.

That there are no material facts stated in the affidavit of Edward F. Bryant, upon which this motion is made, other than those herein stated.

On June 17, 1913, The Pacific Telephone and Telegraph [4] Company, a corporation, filed a bill of complaint in equity, No. 21, in the District Court of the United States, Northern District of California, Second Division, against the City and County of San Francisco, a municipal corporation, and the Mayor and Board of Supervisors of said city and county.

The bill alleged that the complainant was engaged in the business of supplying the City and County of San Francisco and its inhabitants with telephone service; that on March 3, 1913, the said Board of Supervisors passed a certain bill or ordinance, fixing the maximum rates to be charged for furnishing telephone service to the City and County of San Francisco and its inhabitants for the fiscal year commencing July 1, 1913, and threatened to enforce the same against the complainant. The complainant further alleged that said bill or ordinance, and the rates fixed thereby, were wholly void, null, grossly unjust, unreasonable, fraudulent and unconstitutional under the provisions of the Constitution of the United States, and were oppressive and confiscatory, and did not permit of or provide for a just or reasonable or fair compensation for the telephone service to be supplied during the said year by complainant to the said city and county and its inhabitants. Similar allegations were made concerning another ordinance passed by popular vote on an initiative petition on April 22, 1913, fixing another schedule of rates for such service. The Court was asked to enjoin the defendants and all

consumers of telephone service in said city and county, both pending the litigation and perpetually at its conclusion, from enforcing against the complainant the said bills or ordinances, or either of them, or the rates fixed therein.

On June 25, 1913, the District Court made a temporary [5] restraining order restraining the enforcement of these ordinances, and, as certain of the conditions thereof, provided as follows:

“2. That all compensation rates and charges collected by complainant for any telephone service in excess of the rates and charges for such service specified in the two purported ordinances first hereinabove mentioned, or in either of them, shall be paid by complainant into The Bank of California, National Association, which bank is hereby named as depositary for that purpose, such funds to be retained in a separate account designated as ‘The Pacific Telephone and Telegraph Company, Special Account,’ to bear interest, if such can be obtained, at the rate of at least two per cent (2%) per annum, but such deposit must and shall be subject at all times to the order of this Court, and shall be paid out or withdrawn only on checks signed by the special master hereinafter named pursuant to such order and countersigned by a Judge sitting in this court. All of such excess of rates collected by complainant during said calendar month shall be so deposited on or before the last day of said month.

“3. Complainant shall keep, in the City and

County, of San Francisco, full, true and correct books of account, showing in detail the name and address of each person, firm or corporation in said City and County of San Francisco, to whom telephone service is being furnished by complainant, and the amount collected during each calendar month from each of said customers for the telephone service mentioned in said two purported ordinances, or in either of them, in excess of the rates fixed for such service by said ordinances, or by either of them, and the total amount so deposited during such calendar month; said books of account shall be accessible to and open to the inspection of counsel for respondents and the master herein named, at all times during business hours, provided such inspection shall be made so as not to interfere with the ordinary course of business of complainant.

“4. In the event that it shall be finally determined in this suit that either one of said two purported ordinances is valid, legal and in force against complainant, all charges so collected for telephone service in excess of the rates specified in that one of said two purported ordinances which shall be adjudged to be in force, shall be refunded to the person or persons from whom they were collected, and the expense of preparation of all accounts and papers required to make such refund shall be borne by complainant.

“5. On or before ten days from the entry

of this order, complainant shall file herein an undertaking in the sum of Ten Thousand Dollars (\$10,000), with a surety or sureties to be approved by the clerk of this court in favor of and for the benefit of respondents and also of any person who may be injured by reason of this order, conditioned that complainant will pay to respondents, [6] and to any person who may be injured by reason of this order, any and all damages which they or any of them may sustain in the premises if complainant shall fail in this suit, or if it should be determined that this order has been and is improperly issued.

“If said complainant shall fail to abide by any of the foregoing conditions of this order, such failure shall be a sufficient reason for an application to this Court for a dissolution of this restraining order.

“AND IT IS FURTHER ORDERED that Francis Krull, a deputy clerk of this court, be, and he is hereby, appointed a special master in order to facilitate the return of any moneys that may be returnable hereunder to ascertain and report as to the amounts to be paid to each individual customer of complainant in the City and County of San Francisco and as to the identity of such claimant, and to draw, under the order of this Court, checks upon the aforesaid deposit to be made in The Bank of California, National Association, and that the fee and reasonable expense of such special master shall be borne by complainant. He is thus selected as

special master for the reason that the claimants of the fund will be extremely numerous and their identity and the amount of their claims will have to be established by incessant reference to the books of complainant, and such books can be most expeditiously and economically consulted by a special master who is an officer of this court.”

On July 28, 1913, pursuant to stipulation by the parties, the District Court made the following order:

“Pursuant to the annexed stipulation of counsel, it is hereby

“*Ordered*, that the temporary restraining order heretofore made, dated and filed in this court the 24th day of June, 1913, be, and it is hereby modified so that the last sentence of the second condition thereof, being part of the last line of page 3 of said order and the first two lines of page 4 thereof, shall read as follows:

‘All of such excess of rates collected by complainant during each calendar month shall be so deposited on or before the tenth day of the succeeding month.’ ”

On the first Monday in March, 1914, the amount of money on deposit with the bank in suit No. 21, pursuant to the orders hereinbefore set forth, was \$216,865.

There has been assessed to The Bank of California, National Association, on the assessment-roll of the City and County of San Francisco, State of California, for the fiscal [7] year 1914–1915, in volume entitled “Vol. 2, Unsecured Personal Property

1914," at page 16 of said volume, in the manner hereinafter set forth, the sum of \$216,865. In the said assessment The Bank of California, National Association, is described as "Receiver of Impounded Moneys." and is further described as "Receiver or depository under order of Court of the impounded moneys in Equity Suit numbered 21, District Court of the United States, wherein The Pacific Telephone and Telegraph Company is plaintiff and City and County of San Francisco et al., defendants."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of \$2.289 on each \$100 of said valuation, the said taxes computed at the said rate amounting to the sum of \$4964.04.

No order appointing a receiver has been made in the suit hereinbefore referred to, unless the order appointing the special master and requiring the impounding of the excess moneys in the bank, as hereinbefore set forth, comes within that category, but said bank has at all times held said moneys on deposit subject to the conditions specified in the order of Court, as hereinbefore set forth.

The money deposited by The Pacific Telephone and Telegraph Company with the bank, as hereinbefore stated, has in no manner been kept as a separate or designated fund by said bank, but has been mingled with the general funds of the bank and credited by said bank to the suit in connection with which it has been deposited.

The bank has paid the one per cent tax assessed

against it for the fiscal years 1913-1914 and 1914-1915 under the provisions of Article XIII, Section 14, of the Constitution of California. [8]

Prior to the serving and filing of the notice of this motion on January 4, 1915, no application was made to the Court herein for an order directing the payment of the taxes assessed by the city as aforesaid. No such order was made, and such taxes have not been paid, and had not been paid on November 30, 1914, at six o'clock P. M. If said taxes then became delinquent and subject to the penalty provided by law, the amount of such penalty would be \$744.60, making a total of \$5708.64.

That The Pacific Telephone and Telegraph Company, the said complainant, is, and at all times since the commencement of the above-entitled suit has been, a corporation organized and existing under and by virtue of the laws of the State of California and doing a general public telephone and telegraph business in the City and County of San Francisco, throughout the State of California, and elsewhere; that a large number of interstate messages, both telephonic and telegraphic, are, and at all of said times have been, transmitted over the lines of said complainant, and particularly over the lines of complainant in the City and County of San Francisco, and running from said City and County to various points in the States of Oregon, Washington, Nevada and Arizona; that complainant is a "telegraph and telephone company" within the meaning of Section 14 of Article XIII of the Constitution of the State of California; that complainant is a "telegraph com-

pany" and a "telephone company" and a "telegraph and telephone company" within the meaning of the Act of the Legislature of the State of California entitled:

"An Act to carry into effect the provisions of section fourteen of article thirteen of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations, banks and insurance companies for the benefit of the state, all relating to revenue and taxation." [9]

approved April 1, 1911, and the various acts amendatory thereof;

That the said sum of \$216,865, being the sum mentioned in said affidavit of Edward F. Bryant, was collected by complainant from its rate-payers and was deposited by complainant with The Bank of California, National Association, a corporation, in accordance with said temporary restraining order made herein by the above-entitled Honorable Court on the 23d day of June, 1913, which said order is hereby referred to and made a part hereof; that in order to prevent the enforcement of the rate ordinances in said bill of complaint complained of, the said complainant was obliged to make such deposit and to keep said sum on deposit on the first Monday in March, 1914; that complainant claims, but the tax collector and respondents do not admit, that said sum on the first Monday in March, 1914, was, ever since has been, and now is a part of the prop-

erty of complainant, used exclusively in the operation of its telephone business within said state and more particularly within the City and County of San Francisco, and was, has been and is reasonably necessary for use by complainant, as such telephone company, exclusively in the operation and conduct of such telephone business.

That under and by virtue of said section of said Constitution and of said acts of said Legislature, the taxes levied upon complainant, as therein provided, are entirely and exclusively for state purposes, are levied, assessed and collected by the officers of said state directly, and not by the officers of the City and County of San Francisco, and are, as therein expressly provided, in lieu of all other taxes and licenses, state, county and municipal, upon the property there enumerated; that the tax provided for by said section and by said acts was, prior to the 1st day of [10] January, 1915, computed at the rate of 4.2% of the actual gross revenue of complainant from its business in California; that the gross revenue of complainant from said business in the year 1913, as reported by complainant to the State Board of Equalization, in accordance with said acts, was \$12,311,894.09. That in accordance with said section and said acts the officials of said state levied upon complainant for the year 1914 a tax in the sum of \$517,099.55. That on the 17th day of August, 1914, there became due from complainant to said state, and complainant paid to said state as the first installment of said tax, the sum of \$258,549.78. That there is included in said sum of \$12,311,894.09

reported as aforesaid by complainant, upon which said tax was computed, the sum of \$179,974.54, being that portion of the aforesaid sum of \$216,865, which accrued during the year 1913.

That said tax collector and respondents claim, but complainant does not admit, that complainant erred in returning to said State Board of Equalization said sum of \$179,974.54 as part of its gross revenue. That complainant claims, but said tax collector and respondents do not admit, that the tax of \$4,964.04 mentioned in said affidavit of Edward F. Bryant is invalid in this, that the imposition thereof is prohibited by said section and by said act above mentioned, and further, in this that the imposition thereof is double taxation, complainant having already paid the tax thereon.

That the Bank of California, National Association, the corporation above and in said affidavit mentioned, is a banking association organized under the laws of the United States; that said corporation is not authorized to act as receiver, and has never so acted, unless its position in this matter constitutes a receivership.

That complainant claims, but the tax collector and [11] respondents do not admit, that said tax of \$4,964.04 is invalid in this, that while said assessment purports to have been made under and in pursuance of Section 3647 of the Political Code the same was not so made, and that said sum of \$216,865. was not in the possession of any county treasurer, court, county clerk or receiver, and was not assessed to any treasurer, clerk or receiver.

That complainant claims, but said tax collector and respondents do not admit, that said tax is invalid in this, that it is a tax levied upon a national banking association contrary to the provisions of Section 5219 of the Revised Statutes of the United States.

That complainant claims, but said tax collector and respondents do not admit, that said tax is invalid in this, that if the same is levied in accordance with Section 3647 of the Political Code, said section is unconstitutional and void as an interference by the state government with an officer of a court of the United States organized under the Constitution of the United States.

H. D. PILLSBURY,

Solicitor for Complainant.

PILLSBURY, MADISON & SUTRO,

Of Counsel for Complainant.

PERCY V. LONG,

Solicitor for Respondents,

PERCY V. LONG,

City Attorney,

Solicitor for Tax Collector.

[Endorsed]: Filed Jun. 21, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, THE
BOARD OF SUPERVISORS OF THE
CITY AND COUNTY OF SAN FRAN-
CISCO, and PAUL BANCROFT, GUIDO
E. CAGLIERI, ANDREW J. GALLAG-
HER, GEORGE E. GALLAGHER, A. H.
GIANNINI, J. EMMET HAYDEN, FRED
L. HILMER, OSCAR HOCKS, THOMAS
JENNINGS, ADOLPH KOSHLAND, BY-
RON MAUZY, RALPH McLERAN,
CHARLES A. MURDOCK, WILLIAM H.
McCARTHY, DANIEL C. MURPHY, ED-
WARD I. NOLAN, HENRY PAYOT and
ALEX T. VOGELSANG, Members of and
Constituting the Board of Supervisors of the
City and County of San Francisco, and
JAMES ROLPH, JR., Mayor of said City
and County of San Francisco,

Respondents.

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,

Intervenor.

Petition for Allowance of Appeal.

Now comes THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, complainant above-named, and conceiving itself aggrieved by the order and decree of the above-entitled court made and entered by said court in the above-entitled cause on the 16th day of February, 1915, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector [13] of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the 24th day of June, 1913, as and for taxes and penalties thereon, be granted, and wherein and whereby said Court ordered and directed the payment of said sum out of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depository of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant, does hereby appeal from the said order and final decree of February 16, 1915, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herein and herewith, and petitions of said court to allow it, said complainant, to

prosecute an appeal to said United States Circuit Court of Appeals under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the bond which the complainant shall give and furnish upon said appeal, and that a transcript of the record, papers and proceedings upon which said order and final decree were made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

And petitioner will ever pray, etc.

Dated: June 23d, 1915.

H. D. PILLSBURY,

Solicitor for Appellant and Complainant.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant.

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Respondents.

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,

Intervenor.

Assignment of Errors.

Now comes THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, complainant in the above-entitled suit, by its undersigned solicitor, and says that in the record, proceeding and order made and entered in this suit on the 16th day of February, 1915, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the 24th day of June, 1913, as and for taxes and penalties thereon, be granted, and wherein and [15] whereby said Court ordered and directed the payment of said sum out of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depository of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant, there is manifest error, in that the said complainant has been denied its just rights by the order entered by said District Court, and the said complainant hereby assigns and

sets out separately and particularly the following errors, viz:

I.

The Court erred in refusing to deny the application of the City Attorney of the City and County of San Francisco, State of California, as attorney for the tax collector of said city and county, for an order of the above-entitled court directing the payment of the taxes levied and assessed against the above-named the Bank of California, National Association, as receiver and depository of moneys in litigation in the above-entitled suit.

II.

The Court erred in making its order directing that the sum of \$5,708.65 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of sums deposited in the Bank of California, National Association, subject to the order of said Court in the above-entitled suit, and in further ordering Francis Krull, Special Master [16] in Chancery in said suit, draw his check upon said the Bank of California, National Association, for the payment of said sum of \$5,708.65, as taxes and penalties out of the sum deposited and impounded in said The Bank of California, National Association, as aforesaid.

III.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied in accordance with section 3647 of the Political Code of California.

IV.

The Court erred in making said order and in holding and deciding that said moneys, deposited in said The Bank of California, National Association, as aforesaid, were moneys in litigation in the possession of said The Bank of California, National Association, as receiver.

V.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied upon certain sums received by The Bank of California, National Association, as a receiver and depositary in accordance with orders heretofore made in the above-entitled suit by the above-entitled court.

VI.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed.

VII.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed as moneys in litigation in the possession of said The [17] Bank of California, National Association, as receiver.

VIII.

The Court was without jurisdiction to make said order, or any order directing payment of taxes out of said moneys, because it appears from the undisputed facts of the case that said moneys were deposited by complainant with said The Bank of California pursuant to orders of Court in the above-entitled suit, that said moneys should be returned to complainant

in the event complainant was successful in said action, or, in the event that the charges collected by complainant should be held excessive, that said moneys should be refunded to the persons from whom they were collected.

IX.

The Court erred in making said order, because it appears from the undisputed facts of the case that said The Bank of California, National Association, had paid the one per cent tax assessed against it for the fiscal year 1913-1914 under the provisions of Article XIII, Section 14, of the Constitution of California.

X.

The Court erred in making said order, because it appears from the undisputed facts of the case that said moneys were a part of the operative property of complainant, and, as such, under the provisions of Article XIII, Section 14 of the Constitution of California, not subject to taxation by the City and County of San Francisco.

XI.

The Court erred in making said order, because it appears from the undisputed facts of the case that complainant [18] had, at the time said order was made, already paid all the taxes due upon said moneys.

XII.

The Court erred in making said order, because the same subjected said moneys to double taxation.

XIII.

That the Court erred in making said order, be-

cause said Section 3647 of the Political Code, under which it was attempted to assess said tax, does not apply to moneys in the hands of officers of this court, and, if it did so apply, would be unconstitutional as an interference by the state government with the courts of the United States.

XIV.

That the Court erred in making said order, and more particularly, in directing the payment of said penalties amounting to \$744.60, because, if said Section 3647 of the Political Code authorizes the assessment of said taxes, said section provides the only method for the collection thereof, and the other provisions of said Code, imposing penalties for the failure to pay taxes upon the delinquency thereof, have no applicaotin to taxes so levied and assessed.

XV.

The Court erred in making said order because it appears from the undisputed facts of the case that said The Bank of California, National Association, was a banking association incorporated under the National Bank Act.

WHEREFORE, said complainant, The Pacific [19] Telephone and Telegraph Company, prays that the order of the above-entitled court be set aside and that an order be entered denying the aforesaid application.

Dated San Francisco, California, June 23d, 1915.

H. D. PILLSBURY,

Solicitor for Complainant.

PILLSBURY, MADISON & SUTRO,

Of counsel.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation et al.,
Respondents,

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,
Intervenor.

**Order Permitting an Appeal and Fixing Amount of
Cost Bond on Appeal.**

WHEREAS, in the District Court of the United States, Ninth Circuit, Northern District of California, on the 16th day of February, 1915, an order was made and entered in the above-entitled cause, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the 24th day of June, 1913, as and

for taxes and penalties thereon, be granted, and wherein and whereby said Court ordered and directed the payment of said sum out [21] of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depositary of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant; and

WHEREAS, the Pacific Telephone and Telegraph Company, a corporation, complainant in said cause, has, on this 23d day of June, 1915, filed its petition for the allowance of an appeal from said order to the United States Circuit Court of Appeals, Ninth Circuit, together with an assignment of errors, in and by which said petition it has prayed that an order be made fixing the amount of the cost bond which it shall give and furnish on said appeal;

Now, therefore, in consideration of the premises, and good cause appearing therefor, it is ORDERED that said appeal be, and the same is hereby, permitted and allowed.

It is further ORDERED that the said the Pacific Telephone and Telegraph Company, a corporation, complainant herein, shall file its undertaking and cost bond in form and substance conditioned and with sureties in accordance with the provisions of the law and the rules and practice of this court in the said United States District Court in the sum of \$300, which said bond and sureties thereon shall be ap-

proved before filing, and said amount is hereby fixed as the amount [22] of said bond. Said bond will be approved by a judge of this court.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Complainant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Respondents,

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,
Intervenor.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, a corporation, as prin-
cipal, and UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation organized
under the laws of the State of Maryland, and duly
authorized to execute bonds and undertakings in

judicial proceedings pending in the courts of the United States, as surety, are held and firmly bound unto the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, the Board of Supervisors, the Mayor, and the Tax Collector of said city and county, in the full and just sum of Three Hundred Dollars (\$300), lawful money of the United States, to be paid to the said City and County of San Francisco, a municipal corporation, the Board of Supervisors, the Mayor and the Tax Collector of said city and county, to [24] which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors, representatives and assigns firmly by these presents.

Sealed with our seals, and dated this 23d day of June, 1915.

WHEREAS, the above-named complainant, the Pacific Telephone and Telegraph Company, a corporation, has obtained from the District Court of the United States, Northern District of California, its order allowing said complainant to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse an order made and entered in the above-entitled suit, wherein and whereby it was ordered, adjudged and decreed that the application of Edward F. Bryant, Tax Collector of the City and County of San Francisco, for an order directing the payment of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) to him out of the moneys impounded herein under the temporary restraining order made and entered herein on the

24th day of June, 1913, as and for taxes and penalties thereon, be granted, and wherein and whereby said Court ordered and directed the payment of said sum out of said moneys to said Edward F. Bryant, and ordered and directed Francis Krull, Esq., Special Master appointed herein, to draw a check upon The Bank of California, National Association, the depository of said moneys, payable out of said moneys, for said sum of Five Thousand Seven Hundred and Eight and 65/100 Dollars (\$5,708.65) in favor of said Edward F. Bryant:

Now, therefore, the condition of this [25] obligation is such that if the above-named complainant, the Pacific Telephone and Telegraph Company, a corporation, shall prosecute such appeal to effect, and answer all costs if it shall fail to make good said plea, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, said The Pacific Telephone and Telegraph Company, a corporation, has caused these presents to be executed by its president and secretary thereunto duly authorized, and its corporate seal to be hereunto affixed, and said United States Fidelity and Guaranty Company, a corporation, has caused these presents to be executed by its attorney in fact, thereunto duly authorized,

and its corporate seal to be hereunto affixed, this 23d day of June, 1915.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

By G. E. McFARLAND, (Seal)
President.

[Seal] By F. W. EATON,
Secretary.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

W. S. ALEXANDER,
By B. F. CATOR,
Attorney in Fact.

The foregoing bond is hereby approved this 23d day of June, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jun. 23, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division*

IN EQUITY—No. 21.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,
Complainant.

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Respondents,

EDWARD F. BRYANT, Tax Collector of the City
and County of San Francisco,

Intervenor.

Praeceptum (for Transcript of Record).

The Clerk of the above-entitled court will please prepare a transcript of the record for the Appellate Court in the above-entitled cause, and is directed to insert therein the following:

(1) The notice of motion for an order directing the payment of taxes on the impounded moneys.

(2) The agreed statement heretofore filed in the above-entitled cause on June 21st, 1915.

(3) The order of Court directing that the sum of \$5,708.65 be paid to the tax collector of the City and County of San Francisco, State of California, out of certain sums deposited with the Bank of California, National Association, subject to the orders of the above-entitled court in the above-entitled suit. [27]

(4) The opinion of the Honorable Wm. C. Van Fleet rendered upon the hearing of said notice.

(5) All papers filed by complainant, the Pacific Telephone and Telegraph Company, a corporation, in the prosecution of its appeal, including petition for appeal, assignment of errors, order permitting appeal, and citation on appeal, the appeal bond and the approval of the same.

H. D. PILLSBURY,

Solicitor for Complainant.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

[Endorsed]: Filed Jun. 25, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk.
[28]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 21.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Defendants.

**Certificate of Clerk U. S. District Court to Record on
Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing twenty-eight pages, numbered from 1 to 28, inclusive, to be full, true and correct copies of Notice of Motion for Order to Pay Taxes; Order Granting Motion for Payment of Taxes; Oral Opinion on Motion; Stipulation as to Facts; Petition for Appeal; Assignment of Errors; Order Allowing Appeal and fixing amount of Bond on Appeal; Bond on Appeal; and Praecipe for Transcript of Record, as the same remain of record and on file in the office of the clerk of said court, and that the same constitute a record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of Transcript of Record on Appeal is \$17.80; that said amount was paid by Pillsbury, Madison & Sutro, attorneys for the plaintiff, and that the original Citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of August, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk, United States District Court, Northern Dis-
trict of California.

[Ten Cent Internal Revenue Stamp Cancelled
Aug. 13, 1915. W. B. M.] [29]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to the City and County of San Francisco, a Municipal Corporation, the Board of Supervisors of the City and County of San Francisco, and Paul Bancroft, Guido E. Caglieri, Andrew J. Gallagher, George E. Gallagher, A. H. Giannini, J. Emmet Hayden, Fred L. Hilmer, Oscar Hocks, Thomas Jennings, Adolf Koshland, Byron Mauzy, Ralph McLeran, Charles A. Murdock, William H. McCarthy, Daniel C. Murphy, Edward I. Nolan, Henry Payot and Alex T. Vogelsang, Members of and constituting the Board of Supervisors of the City and County of San Francisco, and James Rolph, Jr., Mayor of said City and County of San Francisco, Greeting:

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Appellant,

vs.

THE CITY AND COUNTY OF SAN FRAN-
CISCO, a Municipal Corporation, et al.,
Appellees.

**Order Extending Time to [August 21, 1915, to] File
Record and to Docket the Cause.**

Good cause appearing therefor, it is ordered that the appellant may have to and including the 21st day of August, 1915, within which to file its record on appeal and to docket the cause in the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated: July 22, 1915.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. 2637. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Telephone and Telegraph Company, a corporation, vs. The City and County of San Francisco, a municipal corporation, et al. Order extending time to file Record on Appeal, etc. Filed Jul. 22, 1915. F. D. Monckton, Clerk. Refiled Aug. 14, 1915. F. D. Monckton, Clerk. [32]

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation, THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,

Southern Division.

Filed

SEP - 3 1915

H. D. Munckton,
clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation, THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Bill in Equity	7
Assignment of Errors	19
Attorneys, Names and Addresses of.....	1
Bill in Equity, Amended.....	7
Bond for Costs on Appeal.....	40
Certificate of Clerk U. S. District Court to Trans- cript of Record	44
Citation to Defendants and Appellees.....	2
Decree	17
Motion to Dismiss Amended Bill in Equity....	15
Names and Addresses of Attorneys.....	1
Order Allowing Appellant 60 Days Additional Time to File Transcript on Appeal.....	47
Petition for Appeal	38
Praecipe for Transcript of Record.....	42
Record of Enrollment	5
Statement	5
Undertaking for Costs on Appeal	40

Names and Addresses of Attorneys.

For Appellant:

J. MACK LOVE, Esq., and WALTER E. BURKE, Esq., 1219 Hollingsworth Building, Los Angeles, California.

For Appellees:

HENRY T. GAGE, Esq., and W. I. GILBERT, Esq., 1204-10 Merchants National Bank Building, Los Angeles, California;

CHAS. R. LEWERS, Esq., 842 Flood Building, San Francisco, California; and

LUTHER G. BROWN, Esq., 330 Van Nuys Building, Los Angeles, California. [3*]

In the United States District Court in and for the Southern District of California, Southern Division.

No. A-103—IN EQUITY.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE

*Page-number appearing at foot of page of original certified Record.

CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; The IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California; and the CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

Citation to Defendants and Appellees.

The United States of America,

Ninth Judicial Circuit,—ss.

To the Southern Pacific Railroad Company of California, The Southern Pacific Company, The Southern Pacific Railroad Company, The Imperial Valley Farm Lands Association, The Central Trust Company of New York, The Equitable Trust Company of New York, The Southern Pacific Land Company, The California Land & Water Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth [4] Circuit, in the City of San Francisco in said Circuit on the 22d day of June, 1915, pursuant to an appeal petitioned for by the complainant and appellant herein, and allowed by the Judge of said court and filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein

Geo. S. Fullinwider is complainant and appellant and you and each of you are defendants and appellees, to show cause, if any there be, why the judgment and decree rendered against the said complainant as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the complainant in that behalf.

The next term of said court will convene in the City of San Francisco on the 4th day of October, 1915.

WITNESS the Honorable BENJAMIN F. BLEDSOE, District Judge of the United States, at Los Angeles, California, within said Circuit, this 24th day of May, 1915, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States of America the one hundred and thirty-ninth year.

BLEDSOE,
United States District Judge.

Now, we hereby, this 24 day of May, 1915, accept due personal service of this citation on behalf of the Southern Pacific Railroad Company, The Southern Pacific Railroad Company of California, the Southern Pacific Company, the Imperial Valley Farm Lands Association, The Southern Pacific Land Company, The Central Trust Company, and the Equitable Trust Company, appellees.

CHAS. R. LEWERS and
W. I. GILBERT,
Attorneys for Above-named Defendants and Appellees. [5]

Now, I hereby, this 24th day of May, 1915, accept due personal service of this citation on behalf of the

California Land & Water Company, defendant and appellee.

LUTHER G. BROWN,

Attorney for Above-named Defendant and Appellee. [6]

[Endorsed]: No. A-103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider vs. Southern Pacific R. R. Co. et al., Citation. Filed May 24, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [7]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A-103—EQUITY.

GEORGE S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, THE SOUTHERN PACIFIC

LAND COMPANY, a Corporation of California, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,
Defendants. [8]

[Record of Enrollment.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. A-103—EQ.

GEORGE S. FULLINWIDER,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
a Corporation, et al.,

Defendants.

On the 1st day of December, 1913, complainant filed herein his Bill of Complaint, which is hereto annexed;

On said 1st day of December, 1913, a Subpoena ad respondendum was issued, returnable as provided by law, which Subpoena is hereto annexed;

On the 22d day of December, 1913, a Motion to Strike the Bill of Complaint was filed herein by defendant Southern Pacific Railroad Company, and is hereto annexed;

On the 22d day of December, 1913, a Motion to Dismiss the Bill of Complaint was filed herein by defendant Southern Pacific Railroad Company, and is hereto annexed;

On the 23d day of November, 1914, complainant filed herein his Amended Bill of Complaint, which is hereto annexed;

On the 27th day of November, 1914, a Subpoena ad respondendum addressed to the U. S. Marshal for the Southern District of California, was issued, and is hereto annexed;

On said 27th day of November, 1914, a Subpoena ad respondendum addressed to the U. S. Marshal for the Northern District of California, was issued, and is hereto annexed;

On the 18th day of December, 1914, a Motion to Dismiss Amended Bill was filed by defendants, Southern Pacific Railroad [9] Company of California, a corporation, et al., and is hereto annexed;

On the 21st day of December, 1914, a Motion to Dismiss Amended Bill was filed herein by defendant, The California Land and Water Company, and is hereto annexed;

On the 18th day of January, 1915, a Motion to Dismiss Amended Bill of Complaint was filed herein by defendant, The Equitable Trust Company of New York, and is hereto annexed;

On the 26th day of January, 1915, a Motion to Dismiss Amended Bill of Complaint was filed herein by defendant, Central Trust Company of New York, and is hereto annexed;

On the 5th day of April, 1915, the Motions to Dismiss of the various defendants herein came on to be heard and argument was had thereon, and thereafter, on the 26th day of April, 1915, a Decree dismissing the Amended Bill of Complaint herein was signed,

filed, entered and recorded herein, and is hereto annexed. [10]

*In the United States District Court in and for the
Southern District of California, Southern Division.*

GEO. S. FULLINWIDER,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation,
SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation,
SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation,
Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation,
THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation,
THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California,
THE CALIFORNIA LAND AND WATER COMPANY, a Corporation of California, and
the IMPERIAL VALLEY FARM LAND ASSOCIATION, a Corporation of California,
Defendants.

Amended Bill in Equity.

To the Honorable, OLIN WELBORN and BENJAMIN F. BLEDSOE, Judges of said court, the

above-named complainant states that he is a citizen and resident of the State of California and that he complains of the defendants and for cause of action alleges:

I.

That the above-named defendant, The Southern Pacific Company is a corporation; that this complainant has not the information sufficient to state under what state or laws it is incorporated; that the defendant, The Southern Pacific Railroad Company of California is a corporation organized and existing under the laws of the State of California; that defendant, Southern Pacific Railroad Company of Arizona is a corporation organized and existing under the laws of the State of Arizona; Southern Pacific Railroad Company of New Mexico is a corporation, organized and existing under the laws of the State of New Mexico; [11] that the defendant, The Central Trust Company of New York is a corporation organized and existing under the laws of the State of New York; that the defendant, The Equitable Trust Company of New York is a corporation organized and existing under the laws of the State of New York; that the defendant The Southern Pacific Land Company is a corporation organized and existing under the laws of the State of California; that the defendant, The California Land and Water Company is a corporation organized and existing under the laws of the State of California; that the Imperial Valley Farm Land Association is, as complainant is informed and believes, a corporation organized and existing under the laws of the State of California.

II.

That on the 3d day of March, 1871, there was granted by the Congress of the United States to the Texas Pacific Railroad Company, every alternate odd-numbered section of public land not mineral to the amount of ten (10) sections per mile not mineral within the limits of twenty (20) miles of the line of said railroad and within the State of California and said grant and act contained the following proviso: "That all of said lands granted by this section to said company which shall not be sold or otherwise disposed of as provided by said act within three years after the completion of the entire road shall be subject to settlement and pre-emption like other lands at a price to be fixed by and paid to said company at not exceeding an average of Two and 50/100 (\$2.50) per acre for all lands herein granted."

III.

That said act and Section 23 thereof, made a further grant of every alternate odd-numbered section of the public land not mineral to the amount of ten (10) sections per mile [12] within the State of California within the limits of twenty (20) miles of the line of said railroad to the defendant herein from a point at or near Tehachepi Pass and a point of meeting with the said Southern Pacific Railroad at or near the Colorado River and said section 23 also contained the following provision, namely, "that for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized, subject to the laws of California, to construct a

line of railroad from a point at or near Tehachepi Pass by way of Los Angeles and the Texas Pacific Railroad Company at or near the Colorado River with the same rights, grants and privileges and subject to the same limitations and restrictions and conditions as were granted to said Southern Pacific Railroad Company by the act of July 27, 1866."

IV.

That on the 2d day of May, 1872, the Congress of the United States passed an act amendatory to the act of March 3, 1871, under which and among other things the conditions by which the grantees under the act of March 3, 1871, could mortgage said land so granted to secure the payments of bonds authorized to be issued by the grantees under said act.

V.

That the said line of the railroad of the defendants between Tehachepi Pass and the point of meeting of the Colorado River, as aforesaid by way of Los Angeles, was completed more than ten (10) years prior to the first day of December, 1913.

VI.

That among said lands which have not been sold or otherwise disposed of by said defendant under said grant, and as it was authorized and empowered to do by said grant and which are within ten (10) miles of the line of said railroad and within [13] the place limits of said grant in the County of Imperial; in the State of California is a tract of land described as follows, to wit: South one-half Section 5, Township 11 South, Range 14 East, San Bernardino B. and M.

VII.

That on the 29th day of October, 1913, this complainant tendered to the defendant the sum of Eight Hundred Dollars (\$800) in gold coin of the United States, and thereupon complainant demanded of the defendants a conveyance by the defendants to the complainant of all their right, title and interest in and to the said lands, which demand was then and there refused by the said defendants to the injury and damage of this complainant. That said lands and the subject of this controversy exceed the sum of Three Thousand Dollars (\$3,000) in value. That this complainant was eligible and qualified on the first day of December, 1913, and still is, to settle upon and pre-empt public lands of the United States and was a duly qualified entryman under the Desert Land laws of the United States and was and is duly qualified to purchase said lands under said acts of Congress above referred to in amounts not to exceed Three Hundred and Twenty (320) acres.

VIII.

That this complainant hereby now offers to pay into court the sum of Eight Hundred Dollars (\$800) to be paid to defendant or such one of the defendants as the Court may determine is entitled to said money on the execution to him of a proper conveyance to complainant of said premises.

That this action is brought, among other things, for the purpose of having the Court interpret and construe the acts of Congress hereinbefore referred to and set out in the complainant's bill. [14]

That the complainant is informed and believes it

to be true that the defendants and each and every one of them have or claim some interest in and to the subject matter of this action, the exact character or nature of which this complainant is unable to state, but he demands that whatever interest said defendants or any of them have in or to the subject matter of this complaint that they be compelled to come in court and set up that interest.

WHEREFORE your complainant prays that a construction and interpretation be made by the Court in this action of said sections of said acts of Congress and especially of Sections Nos. 9 and 23 of the said act of Congress approved March 3, 1871, together with the supplementary act passed by Congress on May 2, 1872, and all other acts of Congress that have any relation to the application and constructions of the acts of March 3, 1871, and the act amendatory thereof of May 2, 1872.

2d. That it be adjudged and ordered that the defendants upon the payment into court of the amount of Eight Hundred Dollars (\$800) as herein set out, convey to complainant all their right, title and interest in and to the lands herein described, and that said moneys so paid into court be ordered paid to defendant or defendants that the Court determines is entitled to receive the same.

3d. That the complainant have such other further and general relief as in equity and good conscience it is entitled to.

WALTER E. BURKE,
J. MACK LOVE,

Attorneys for Complainant. [15]

State of California,
County of Los Angeles,—ss.

Geo. S. Fullinwider, being by me first duly sworn deposes and says that he is the complainant in the foregoing action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his knowledge except as to the matters which are therein stated upon his information or belief and as to those matters, that he believes it to be true.

GEO. S. FULLINWIDER,

Subscribed and sworn to before me this 14th day of November, 1914.

[Seal] FLORENCE W. SAUNDERS,
Notary Public in and for the County of Los Angeles,
State of California.

It is hereby ordered that the above amended complaint be filed.

BENJAMIN F. BLEDSOE,
Judge.

We hereby stipulate that the foregoing be filed herein as the Amended Complaint of the complainant.

Dated Nov. 21, 1914.

I. H. LEWERS and
W. I. GILBERT,
Attorneys for Defendants Southern Pacific Com-
pany, The Southern Pacific Railroad Company.
[16]

[Endorsed]: No. A. 103 Eq. United States Dis-
trict Court, Southern District of California, South-

ern Division. George S. Fullinwider, vs. Southern Pacific Company et al. Amended Bill in Equity. Received Copy of Within Amended Bill in Equity this 18th day of November, 1914. Attorneys for Defts. Filed Nov. 23, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Walter E. Burke, J. Mack Love, Attorney, Los Angeles, Cal. New Address, 1219 Hollingsworth Bldg. [17]

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

No. A—103.

GEORGE S. FULLINWIDER,

Complainant.

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, SOUTHERN PACIFIC RAILROAD OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation, of California, THE CALI-

FORNIA LAND AND WATER COMPANY, a Corporation of California, and the IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California,
Defendants.

Motion to Dismiss Amended Bill in Equity.

To the United States District Court, in and for the Southern District of California, Southern Division: Honorable OLIN WELLBORN and BENJAMIN F. BLEDSOE, Judges thereof; and to Reuben Erickson, Complainant Above Named; and to Walter E. Burke and J. Mack Love, Attorneys for Complainant:

The above-named defendants, Southern Pacific Company, a corporation, the Southern Pacific Railroad Company of California, a corporation, and the Imperial Valley Farm Lands Association, a corporation of California, now move the above-entitled Court to dismiss the above-entitled action and bill of complaint therein, upon the ground:

I.

This Court is without jurisdiction of the subject matter of said action, and is without jurisdiction to hear or determine [18] said cause on its merits.

II.

That said Bill of Complaint does not state facts sufficient to constitute a cause of action in equity, or otherwise, or at all.

Upon the hearing of said motion, defendants will rely upon the Bill of Complaint in said action and upon all the acts of Congress referred to or mentioned in said Bill of Complaint.

Dated, Los Angeles, California, Dec. 18, 1914.

CHAS. R. LEWERS,
HENRY T. GAGE,
W. I. FOLEY, and
W. I. GILBERT,

Attorneys for Said Defendants.

WM. F. HERRIN,

Counsel for Said Defendants.

[Endorsed]: Original. No. A—103. In the United States District Court, in and for the Southern District of California, Southern Division. George S. Fullinwider, Complainant, vs. Southern Pacific Company, a Corporation, et als., Defendants. Motion to Dismiss Amended Bill in Equity. Due service admitted this 18th day of Dec., 1914. Walter E. Burke, Filed Dec. 18, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Henry T. Gage and W. I. Gilbert, 1204-10 Mer. Natl. Bank Bldg., Attorneys for Defendants. [19]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. A-103—IN EQUITY.

GEORGE S. FULLINWIDER,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
SOUTHERN PACIFIC RAILROAD
COMPANY OF CALIFORNIA, a Corporation,
SOUTHERN PACIFIC RAILROAD
COMPANY OF ARIZONA, a Corporation,

SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, SOUTHERN PACIFIC LAND COMPANY, a Corporation, CALIFORNIA LAND AND WATER COMPANY, a Corporation, and the IMPERIAL FARM LAND ASSOCIATION, a Corporation,

Defendants.

Decree.

This cause having come on to be heard at this term on the 5th day of April, 1915, on the motions of the defendants to dismiss the amended bill of complaint, and having been argued by counsel for the respective parties at said time, and the Court having at said time ordered that said motions to dismiss be sustained without leave to amend;

Now, therefore, it is hereby ordered and decreed that said amended bill of complaint be and the same is hereby finally dismissed, and judgment is hereby given the said defendants for their costs in this suit in the sum of Thirty-four 40/100 (34.40) Dollars.

Dated April 26, 1915.

BENJAMIN F. BLEDSOE,

District Judge.

Decree Entered and Recorded April 26, 1915,

Attest: WM. M. VAN DYKE,

Clerk.

By T. F. Green,

Deputy Clerk. [20]

[Endorsed]: No. A—103. In the District Court of the United States, Southern District of California, Southern Division. George S. Fullinwider, Plaintiff. vs. Southern Pacific Company, a Corporation, et al., Defendants. Decree. Filed Apr. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles R. Lewers, Attorney for Defendants, 828 Flood Building, San Francisco, Cal. [21]

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

No. A-103—IN EQUITY.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; THE

IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation; and the CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

Assignment of Errors.

And now comes the complainant, Geo. S. Fullinwider, and says that in the record and proceedings of said court in the above-entitled cause and in the final decree made and entered therein on the 26th day of April, 1915, there is manifest error and for error the said complainant assigns the following:

1. The Court erred in sustaining the motion to dismiss of the defendants, The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Company and the Imperial Valley Farm Lands Association to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

2. The Court erred in sustaining the motion to dismiss of the defendant, the Central Trust Company, to the amended bill of the [22] complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

3. The Court erred in sustaining the motion to dismiss of the defendant, the Equitable Trust Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

4. The Court erred in sustaining the motion to dismiss of the defendant, the Southern Pacific Land

Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

5. The Court erred in sustaining the motion to dismiss of the defendant, the California Land & Water Company, to the amended bill of the complainant, and directing that said amended bill be dismissed for want of equity in said amended bill.

6. The Court erred in sustaining the motion of the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, and the Imperial Valley Farm Lands Association, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

7. The Court erred in sustaining the motion of the defendant, the Central Trust Company, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

8. The Court erred in sustaining the motion of the defendant, the Equitable Trust Company, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits. [23]

9. The Court erred in sustaining the motion of the defendant, the Southern Pacific Land Company, to dismiss on the ground that the Court was without

jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

10. The Court erred in sustaining the motion of the defendant, the California Land & Water Company, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

11. The Court erred in not overruling the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, The Southern Pacific Company, and the Imperial Valley Farm Lands Association's motion to dismiss and requiring the said defendants and each of them to answer or plead to said amended bill.

12. The Court erred in not overruling the defendant, the Central Trust Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

13. The Court erred in not overruling the defendant, the Equitable Trust Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

14. The Court erred in not overruling the defendant, the Southern Pacific Land Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

15. The Court erred in not overruling the defendant, the California Land & Water Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

16. The Court erred in that it did not hold that the amended bill of complaint of the complainant stated a good cause of action to which the defendants and each of them should be required to file their answer or plea.

17. The Court erred in entering a decree in favor of the [24] defendants, dismissing the complainant's amended bill and entering judgment against complainant in favor of the defendants for their cost and disbursements herein.

18. The Court erred in not granting to said complainant the relief prayed for by him in his said amended bill.

19. The Court erred in not granting to said complainant any equitable relief.

(a) As said amended bill contains allegations and matters entitling said complainant to equitable relief.

(b) Said amended bill contains allegations and matters entitling the said complainant to the relief prayed for in said amended bill.

20. The Court erred in holding that the complainant was not entitled to the relief prayed for by him in his said amended bill.

21. The Court erred in not holding that the proviso in Section 9 of the act of Congress of March 3, 1871, was a conditional limitation. Said proviso in Section 9 of said act is as follows:

“That all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and

pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

22. The Court erred in not holding that the said proviso copied in assignment No. 21 was a conditional limitation.

That the happening of the conditions subsequent therein specified entitled the complainant herein to a specific performance of said contract upon the payment to the defendants of the amount of \$2.50 per acre.

23. The Court erred in holding that there was not jurisdiction in the Court on the equity side to enforce a specific performance of said contract on behalf of the complainant upon the happening of the conditions subsequent in said proviso of [25] Section 9 of said act of Congress of March 3, 1871.

24. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, providing "that said lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands," was sufficiently definite to be enforced as a conditional limitation.

25. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, was a binding contract upon the defendants and each of them, by which they and each of them were obligated to convey all interest they had in said land described in complainant's amended bill, upon the payment by the complainant to them or to whichever one of the

defendants the Court should direct the same should be paid to, or \$2.50 per acre.

26. The Court erred in not holding that this suit can be maintained by complainant as one to enforce a specific performance of said contract or proviso.

—(a) The defendants hold the legal title to and the possession of the said granted lands.

(b) Complainant having asked for specific performance equitable relief may and can be granted him by specific performance.

27. The Court erred in not holding that the provisions of said act of March 3, 1871, making said land grants, wherein it was provided “that all lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands, etc.” were both positive and negative, requiring the grantees and especially these defendants and each of them to sell to this complainant and to settlers who should apply to buy and who were eligible to settle upon or pre-empt public lands, at a price not greater than an average of \$2.50 per acre, and requiring said [26] defendants to refrain from selling any of the granted lands to other than persons eligible to settle and pre-empt public lands, in such quantities as is provided by law for the disposition of public lands and at a price not greater than an average of \$2.50 per acre.

28. The Court erred in holding that the defendant, the Southern Pacific Railroad Company of California, and each and every of the other defendants claiming an interest in said lands or the defendants

claiming by, through or under it, took said grant *only* "with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company by the act of July 27, 1866.

29. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, applied to and was binding upon the defendants and every one of them.

30. The Court erred in holding that the proviso in Section 9 of the act of March 3, 1871, was not binding upon the defendants and every one of them.

31. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, was designed to devote said lands conveyed by said grants "that had not been sold or otherwise disposed of by the defendants within three years after the completion of the entire road," to settlement and to prevent the monopoly of said lands. That said grant was a law as well as a grant, that said defendants could not defeat the purpose of the proviso requiring sales to settlers and pre-emptors, by themselves monopolizing and holding the lands and by refusing to sell at all or by refusing to sell any of them except to such persons and in such quantities and at such prices as they or either of them saw fit.

32. The Court erred in holding that the proviso in Section 9 of the act of Congress of March 3, 1871, was not a conditional [27] limitation, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the defendants or either of them to accept

and become vested with the title to the lands under the grant of March 3, 1871.

33. The Court erred in not holding that the proviso in Section 9 of said act of Congress of March 3, 1871, was and is a conditional limitation, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under said Southern Pacific Railroad Company of California, to accept and become vested with the title to the lands under the grant of 1871.

34. The Court erred in refusing to enter a decree of specific performance on behalf of Geo. S. Fullinwider, the complainant herein, and against the defendants, the Southern Pacific Railroad Company of California and each and every one of the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to the complainant the lands sought to be purchased by him, upon payment to them of the purchase price therefor, or \$2.50 per acre.

35. The Court erred in holding that Congress did not intend, by the proviso in Section 9 of the act of March 3, 1871, to give to settlers and pre-emptors the right to compel the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands, to sell to them the lands embraced within said grant, according to the terms of the proviso in said act of March 3, 1871.

36. The Court erred in not holding that the de-

fendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said lands or claiming by, through or under it, be required to convey said lands to the [28] complainant applying to purchase the same and tendering to them \$2.50 per acre in payment therefor.

37. The Court erred in refusing to direct and decree a specific performance on behalf of the complainant against the defendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to said complainant the lands sought to be purchased by said complaint as prayed for in his amended bill.

38. The Court erred in holding that the proviso in said grant did not constitute a contract entered into by and between the defendant, the Southern Pacific Railroad Company of California and the Government, for the benefit of and enforceable by, the complainant.

39. The Court erred in holding that the proviso in Section 9 of the Act of March 3, 1871, providing "that said lands should be subject to settlement and pre-emption like other lands, that were not sold or otherwise disposed of by the defendants within three years after the completion of the entire road," was not a conditional limitation for the use and benefit of this complainant and those who in good faith, being eligible to make settlement and pre-empt public lands, who should apply to make settlement upon said lands and to purchase the same in quantities

and at the price provided by said act.

40. The Court erred in holding that the defendants, by the provisions of said grant contained, did not take in all lands still held by them under said grant which had not been sold or otherwise disposed of as provided, etc., a conditional limitation estate therein for the use and benefit of the complainant.

(a) The nature and quality of said interest in said grant are sufficiently specific and definite.

(b) The application to purchase, and tender of payment [29] and being eligible to make settlement and pre-emption on public lands is a sufficient identification.

41. The Court erred in not holding that the offer and tender of the complainant to purchase the lands described by him in his amended bill of complaint, from the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under it, gave to the complainant a vested right in said lands in default of acceptance of such offer and a conveyance to him by the defendants.

42. The Court erred in not holding that the proviso in the Act of March 3, 1871, is sufficiently definite and certain to be enforced as a conditional limitation.

43. The Court erred in holding that the proviso in the act of March 3, 1871, providing "that said lands should be subject to settlement and pre-emption like other lands," was not sufficiently definite and certain as a conditional limitation and that it is not sufficiently definite and certain to be specifically enforced as a conditional limitation for the use

and benefit of the complainant.

44. The Court erred in not holding that the proviso in the act of March 3, 1871, providing "that said lands under certain conditions, should be subject to settlement and pre-emption like other lands," was intended by Congress as a conditional limitation for the use and benefit of the complainant and such other settlers as brought themselves within said proviso.

45. The Court erred in not holding that the proviso in the act of March 3, 1871, was a conditional limitation, impressed upon and running with the title to the land until the title should have ultimately become vested in a settler upon the terms and under the conditions provided in said grant.

46. In case the Court should have been of the opinion [30] that said conditions did not create a conditional limitation estate, then the Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and each and every of the defendants claiming an interest in said lands or claiming an interest, by, through or under it, took the titles to said lands in trust for this complainant and other settlers eligible to settle and pre-empt public lands and who brought themselves within the provisions of said act and upon said complainant or any other such settlers paying to the said defendant or defendants, the \$2.50 per acre, they would be compelled to convey said lands to the complainant or such settlers.

47. The Court erred in holding that this complainant was not such a settler as was contemplated

by the act of March 3, 1871.

48. The Court erred in holding that the complainant did not have a vested interest in the land sought to be purchased by him, by reason of his offer and tender to purchase the land upon the terms provided in the act of March 3, 1871.

49. The Court erred in not holding that Geo. S. Fullinwider, the complainant herein, was entitled to the relief prayed for in his amended bill herein or to any relief, and in holding that said amended bill of complainant should be dismissed.

50. The Court erred in not holding that the defendants, The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, The Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, individually and collectively, any or either of them, had violated the provisions of said act of Congress of March 3, 1871, relative to settlement and pre-emption of said lands by denying complainant's right under said act.

51. The Court erred in not holding that the defendants, [31] The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, The Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, or any or either of them had failed and refused and omitted to deal with

the said lands or any part thereof in breach of said act of Congress and had thereby defeated the settled policy and intent of Congress in the premises.

52. The Court erred in not holding that said proviso in Section 9 of the act of March 3, 1871, is enforceable by the complainant.

53. The Court erred in not holding that it was impossible for the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, The Southern Pacific Land Company and the California Land & Water Company, or any or either of them, to receive said grant with the same "rights, grants and privileges" as those contained in the act of July 27, 1866, for the reason that the time within which they were required to perform the conditions of sections 8 or 12 of said act were not extended.

53½. The Court erred in holding that under Section 23 of the act of March 3, 1871, the Southern Pacific took said grant under the act of July 27, 1866.

(a) That said act of July 27, 1866 is not sufficiently designated by said section in order for the Court to determine just what act of 1866 was referred to.

(b) That the reference of Section 23 of said act of March 3, 1871, to the act of 1866 is too indefinite and uncertain.

54. The Court erred in holding that the defendants, the Southern Pacific Railroad Company of Cali-

fornia, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company and the [32] California Land & Water Company, individually or collectively, or any or either of them, were not bound by all of the terms and conditions or the whole of the act of Congress of March 3, 1871.

55. The Court erred in not holding that the defendants, the Southern Pacific Railroad Company of California, the Southern *Southern* Pacific Railroad Company, the Southern Pacific Company, The Imperial Valley Lands Association, the Central Trust Company, The Equitable Trust Company, the Southern Pacific Land Company, and the California Land & Water Company, individually or collectively, or any or either of them, took said grant with all the "rights, grants and privileges, and subject to all of the limitations, restrictions and conditions" of the act of March 3, 1871, as well as any limitations, restrictions and conditions contained in the act of July 27, 1866.

56. The Court erred in not holding that the proviso in respect to the settlement and pre-emption of said lands, as provided in said act of March 3, 1871, was a question in the case requiring judicial interpretation, construction and determination.

57. The Court erred in not holding that there was jurisdiction in the court on the equity side of the subject matter of this suit.

58. The Court erred in not holding that there was

jurisdiction in the court on the equity side to enforce a specific performance for a breach of the condition in said proviso of said act of March 3, 1871.

59. The Court erred in not holding that there was jurisdiction in the court on the equity side to enforce a specific performance for a breach of an assumed conditional limitation in the proviso of said act of March 3, 1871.

60. The Court erred in not holding that the complainant, being eligible to make settlement and pre-empt public lands, had a right to enforce specific performance of contract from the defendants, The Southern Pacific Railroad Company of California or any of the defendants claiming an interest in it, or claiming by, through or under it, upon payment to them of \$2.50 per acre. [33]

61. The Court erred in sustaining the motion to dismiss of the defendants, the Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Company, the Imperial Valley Farm Lands Association, The Central Trust Company, the Equitable Trust Company, The Southern Pacific Land Company and the California Land & Water Company, and directing a decree dismissing the complainant's amended bill, together with their costs.

62. The Court erred in holding that the said proviso of said act of March 3, 1871, or any act amendatory thereof touching settlement and pre-emption of said land as therein provided, in anywise or at all, did not refer to and affect the title to the said lands or any part thereof.

63. The Court erred in holding that the primary and controlling object of Congress of the act of March 3, 1871, and any acts amendatory thereof, was not to provide for the sale of the granted lands to citizens eligible to make settlement and pre-emption as provided in said act.

64. The Court erred in holding that the proviso for the sale of the lands granted to citizens eligible to make settlement and pre-emption upon public lands, etc., as contained in the act of March 3, 1871, and the acts amendatory thereof, were not binding laws and contracts upon the defendants and each and all of them.

65. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and its successors in interest, and the defendants, the Southern Pacific Railroad Company, The Southern Pacific Company, the Imperial Valley Farm Lands Association, The Central Trust Company, The Equitable Trust Company, The Southern Pacific Land Company and the California Land & Water Company, and any or either of them, under said land grant of the act of March 3, 1871, in any event, were required to sell all the lands not otherwise sold or disposed of within three years after the completion of the entire road, etc., to citizens [34] eligible to make settlement and pre-emption of public lands.

66. The Court erred in not holding that the proviso in the act of March 3, 1871, and the acts amendatory thereof were operative and enforceable laws and contracts and required the defendants to sell said

lands to persons only eligible to make settlement and pre-emption in such quantities as is provided by law for the distribution of the public land and at a price not to exceed an average of \$2.50 per acre, and that it prohibited them or either or any of them as to all lands remaining unsold three years after the completion of the entire road, to sell to persons other than those eligible to make settlement and pre-emption upon public lands.

67. The Court erred in not holding that Congress had waived all of the preliminary steps necessary for actual settlers to take in order to acquire a right in the public domain except that of paying to the defendants the purchase price for said land not to exceed an average of \$2.50 per acre.

68. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said lands or claiming by, through or under it, had violated the law and every contract they had entered into when they accepted said grant under the act of March 3, 1871, by refusing to accept the tender made to them by complainant, and conveying to him the land described in his amended bill.

69. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said land or claiming by, through or under it, had violated said law and contract which they entered into when they accepted said grant under the act of March 3, 1871, and had thereby defeated the primary object, purpose, intent, and settled policy

of Congress in regard to public lands involved in these land grants and especially in this one. [35]

70. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the defendants claiming an interest in said lands so granted or any of the defendants claiming by, through or under it, had waived their right to fix a price upon said lands other than an average of \$2.50 per acre and should be compelled to convey the same upon payment to them of the maximum price of \$2.50 per acre by this complainant.

71. The Court erred in not holding that Congress has the absolute control over the settlement, sale and distribution of the public lands and that it has the power to waive any and all of the preliminary steps that might be required to be taken to initiate on the part of a settler or pre-emptor, a vested right to public lands, and that it did, under the terms and conditions of the act of March 3, 1871, waive all of the preliminary steps and conditions required of settlers and pre-emptors to be done, except that they must be eligible to take public lands and must pay the defendants the purchase price, and that upon the happening of these two conditions, the equitable title to the land became vested in the complainant or settler.

72. The Court erred in sustaining the defendants and each of their motions to dismiss and directing that the complainant's bill be dismissed without leave to amend.

73. The Court erred in sustaining the defendants and each of their motions to dismiss the complainant's bill and in not directing that said complainant

be permitted to amend his bill within a time fixed by the Court, or that the same should be dismissed.

WHEREFORE, the complainant prays that the said decree be reversed.

J. MACK LOVE,

Attorney for Complainant and Appellant.

738 H. W. Hellman Bldg., Los Angeles, California.

[36]

[Endorsed]: No. A-103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider vs. Southern Pacific, et al. Assignment of Errors. Filed May 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. J. Mack Love, Attorney at Law, 738-739 H. W. Hellman Building, Los Angeles, Telephone F. 5021, Attorney for Complainant. [37]

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

No. A-103—IN EQUITY.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO,

a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; THE CALIFORNIA LAND & WATER COMPANY, a Corporation of California, and the IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California,
Defendants.

Petition for Appeal.

The above-named complainant, conceiving himself aggrieved by the decree made and entered on the 26th day of April, 1915, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

J. MACK LOVE,
Attorney for Complainant and Appellant,
738 H. W. Hellman Bldg., Los Angeles, California. [38]

Los Angeles, California, May 16, 1915.
And now, to wit, on the 16th day of May, 1915, it is

ordered that the above and foregoing appeal be allowed as prayed for.

BLEDSON,
United States District Judge.

[Endorsed]: No. A-103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider vs. Southern Pacific, et al. Petition for Appeal. Filed May 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. J. Mack Love, Attorney at Law, 738-739 H. W. Hellman Building, Los Angeles, Telephone F 5021, Attorney for Complainant. Eq. O. B. [39]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE

TRUST COMPANY OF NEW YORK,
STATE OF NEW YORK, a Corporation;
THE SOUTHERN PACIFIC LAND COM-
PANY, a Corporation of California; THE
IMPERIAL VALLEY FARM LANDS AS-
SOCIATION, a Corporation of California;
and THE CALIFORNIA LAND & WATER
COMPANY, a Corporation,

Defendants.

Undertaking for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Geo. S. Fullinwider, as Principal, and
National Surety Company, as Surety, are held and
firmly bound to the above-named defendants in the
sum of Two Hundred Fifty (\$250) Dollars, lawful
money of the United States, well and truly to be paid.

THE CONDITION of the above obligation is such
that,

WHEREAS, the said Geo. S. Fullinwider has ap-
pealed to the United States Circuit Court of Appeals
from the judgment and order of the Court entered
in this case on the 5th day of April, 1915, dismissing
his case; [40]

NOW, THEREFORE, if the said Geo. S. Fullin-
wider pays all costs and damages that may accrue
and be taxed against him on said appeal, not exceed-
ing Two Hundred Fifty (\$250) Dollars, in favor of
the defendants, then this obligation to be void, other-
wise to be and remain in full force and effect.

SEALED AND DATED at Los Angeles, Cali-

fornia, this 21st day of May, 1915.

GEORGE S. FULLINWIDER.

By J. MACK LOVE,

His Atty.

NATIONAL SURETY COMPANY.

Per CHAS. SEYLER, Jr., (Seal)

Attorney in Fact.

State of California,

County of Los Angeles,—ss.

On this 21st day of May, A. D. 1915, before me, Hazel Jones, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Chas. Seyler, Jr., known to me to be the person whose name is subscribed to the within instrument, as the Attorney in Fact of National Surety Co. and acknowledged to me that he subscribed the name of National Surety Co. thereto as surety, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

HAZEL JONES,

Notary Public in and for said County and State.

[41]

[Endorsed]: A 103 Eq. Geo. S. Fullinwider, Plaintiff, vs. Southern Pacific R. R. Company et al., Defendants. Cost Bond. Filed May 24, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk.

This bond approved this 22d day of May, 1915.

BLED SOE,

Judge U. S. District Judge. [42]

*In the United States District Court in and for the
Southern District of California, Southern Di-
vision.*

No. A-103—IN EQUITY.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Cor-
poration; THE SOUTHERN PACIFIC
RAILROAD COMPANY OF CALI-
FORNIA, a Corporation; THE SOUTHERN
PACIFIC RAILROAD COMPANY OF
ARIZONA, a Corporation; THE SOUTH-
ERN PACIFIC RAILROAD COMPANY
OF NEW MEXICO, a Corporation, Consoli-
dated; THE CENTRAL TRUST COM-
PANY OF NEW YORK, STATE OF NEW
YORK, THE EQUITABLE TRUST COM-
PANY OF NEW YORK, STATE OF NEW
YORK, a Corporation; THE CALIFORNIA
LAND & WATER COMPANY, a Corpora-
tion; THE SOUTHERN PACIFIC LAND
COMPANY, a Corporation of California, and
THE IMPERIAL VALLEY FARM LANDS
ASSOCIATION, a Corporation of California,
Defendants.

Praeipie [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please make a transcript of the following
papers and records in this case for the Circuit Court
of Appeals:

A copy of the amended petition with the date of its filing; a copy of the motion to dismiss filed by the defendants, the Southern Pacific Railroad Company of California, a Corporation, The Southern Pacific Company and the Imperial Farm Lands Association, a Corporation of California, together with the date of its filing; a memorandum that the other defendants filed a similar motion and the date when all of said motions were filed; a copy of all of the appeal papers, including the petition for an appeal, together with the Judge's order granting the appeal, the praecipe for the transcript, the citation, the cost bond for appealing and the decree of the Court entered in this case, showing the dates on all of the [43] papers when filed, and the date when the decree was entered, omitting the caption from all of the papers except the amended petition.

J. MACK LOVE,

Attorney for Complainant and Appellant.

We hereby acknowledge service of a copy of the within and foregoing praecipe upon us, as attorneys for the undersigned defendants this 24 day of May, 1915.

CHAS. R. LEWERS and

W. I. GILBERT,

Attorneys for The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Co., The Southern Pacific Land Company, The Imperial Valley Farm Lands Association, The Central Trust Company and The Equitable Trust Company.

I hereby acknowledge service of a copy of the within and foregoing praecipe upon me, as attorney for the defendant, the California Land & Water Company, this 24th day of May, 1915.

LUTHER G. BROWN,

Attorney for the California Land & Water Company.

[Endorsed]: No. A-103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider, vs. Southern Pacific Company et al. Praecipe. Filed May 24, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. J. Mack Love, Attorney at Law, 738, 739 H. W. Hellman Building, Los Angeles. Telephone F 5021, Attorney for Complainant. [44]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. A-103—EQUITY.

GEORGE S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTH-

ERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation; THE EQUITABYE TRUST COMPANY OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States, in and for the Southern District of California, do hereby certify the foregoing forty-four (44) typewritten pages, numbered from 1 to 44 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Record of Enrollment, Citation on Appeal, Amended Bill of Complaint, Motion [45] to Dismiss, filed by defendants, the Southern Pacific Railroad Company of California, a Corporation, The Southern Pacific Company and The Imperial Valley Farm Lands Association, a corporation of California, Decree, Assignments of Error, Petition for and Order Allowing Appeal, Bond on Appeal, and Praeceptum for Transcript of Record on Appeal, in the above and therein entitled cause, and that the same constitute the record in said cause as specified in the said Praeceptum for Transcript on Appeal, filed in my office on behalf of the appellant by his solicitor of record;

I do further certify that the cost of the foregoing record is \$21.60/100, the amount whereof has been paid me by George S. Fullinwider, the appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 10th day of August, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States, in
and for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
8/10/15. C. N. W.] [46]

[Endorsed]: No. 2638. United States Circuit Court of Appeals for the Ninth Circuit. George S. Fullinwider, Appellant, vs. The Southern Pacific Railroad Company of California, a Corporation, The Southern Pacific Company, a Corporation, The Southern Pacific Railroad Company, a Corporation, The Imperial Valley Farm Lands Association, a Corporation, The Central Trust Company of New York, a Corporation, The Equitable Trust Company of New York, a Corporation, The Southern Pacific Land Company, a Corporation and the California Land & Water Company, a Corporation, Appellees.

Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed August 20, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Allowing Appellant 60 Days' Additional
Time to File Transcript on Appeal.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

GEO. S. FULLINWIDER,

Complainant and Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COM-

PANY, a Corporation of California; THE CALIFORNIA LAND & WATER COMPANY, a Corporation of California, and THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California,
Defendants and Appellees.

Good cause appearing therefor, it is hereby ordered that the appellant, Geo. S. Fullinwider, have sixty (60) days additional and further time within which to file his Transcript on appeal in the above-entitled suit, with the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated at Los Angeles, June 17th, 1915.

BLEDSON, J.,

United States District Judge.

[Endorsed]: No. 2638. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time 60 Days' Additional Time to File Record Thereof and to Docket Case. Filed Aug. 20, 1915. F. D. Monckton, Clerk.

12
No. 2638.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

October Term, 1915.

Geo. S. Fullinwider,

Complainant and Appellant,

vs.

**The Southern Pacific Railroad Com-
pany of California, et al.,**

Defendants and Appellees.

BRIEF FOR COMPLAINANT AND APPELLANT.

J. MACK LOVE,

H.W.Hellman Bldg., 4th & Spring, Los Angeles,
Solicitor and Attorney for Complainant and Appellant.

TABLE OF CONTENTS.

	PAGES
STATEMENT OF THE CASE.....	3— 9
Allegations of complainant's bill.....	4—12
Substance of defendant's motion to dismiss..	13
Decree signed and entered by trial court....	13—14
ASSIGNMENT OF ERRORS.....	14—27
THE THREE PROPOSITIONS INVOLVED AND URGED BY APPELLANT.....	27—28
General statement of the controversy by appellant	28—30
FIRST PROPOSITION.....	30
General statement and discussion of the propo- sition and the rudimentary elements of law involved that have been settled by the courts	30—33
(1) Brief history of the Federal land laws....	33—35
Pre-emption Law.....	35
Homestead Law.....	36
Development of the policy of Congress in regard to the public domain and dona- tions of public lands to railroads.....	37
History of public land grants covered three distinct periods.....	37
Evils of unrestricted grants.....	38
(2) History of the bill of March 3, 1871.....	39
Facts showing general sentiment of the country in regard to railroad grants..	40—42

	PAGES
Authorities indicating it is necessary to recur to the history and situation of the country to ascertain the reason as well as the meaning of their provisions	42
(3) The doctrine of <i>in pari materia</i> and its application	43—44
General statement of the doctrine and authorities cited	45
The court will not be bound by the strict letter of the law in construing it	45
Authorities cited on this proposition	45—48
The many acts of Congress on public lands constitute a system of laws, are all <i>in pari materia</i> , etc.	48
Authorities cited	48—50
Words cannot be segregated from the entire context and thus construed as unambiguous	50—52
(4) The language and reasonable and natural construction of section 23, etc., makes it impossible for the court to adopt the construction contended for by defendants	53—54
(a) Congress, in reviving lapsed grants, as well as extending the time of grants, always extended the time within which the companies were to perform the conditions precedent	55
(b) The defendants must have accepted the grant under the act of March 3, 1871,	

	PAGES
because, without doing violence to the language, either construction might be made	56
(c) That construction will be adopted that is most favorable to the public.....	56
(d) To adopt the construction that the proviso has no reference to the grant to the defendants leads to absurd and irrational results.....	56
(5) From March 3, 1869, to March 3, 1871, there was not a grant made, revived or extended that did not have attached to it a settlers' clause.....	57
Authorities cited where the courts have refused to make a literal interpretation where absurd and ridiculous results would follow.....	58
The crucial question involved.....	59
Recapitulation of the points urged under first proposition.....	60—61
SECOND PROPOSITION	61
General statement.....	61—64
The law of conditional limitation in California	64
Authorities in support of this proposition..	65—70
Under the act, Congress conveyed an absolute fee to the lands to the railroad company upon two conditions precedent....	70
General discussion of that proposition....	70—71

	PAGES
THIRD PROPOSITION.....	72
Comparison of the provisos of the acts in- volved in the Oregon case and the one in the case at bar.....	72
Distinctions pointed out.....	73—74
Intended as enforceable covenants.....	74
Provisions not too indefinite and uncertain.....	75—76
Duty of company to immediately fix price of land.....	77
Acceptance of grant by company made this act a formal standing offer and invitation to qualified citizens to become purchasers thereof	77
Authorities cited in support of the propo- sition	78—80
Oregon Donation Act.....	81
Authorities cited.....	81—82
General discussion of these authorities cited.....	82—84
Congress may deal with public lands in any manner it sees fit.....	85
Authorities cited in support of this propo- sition	85—86
One eligible to make settlement has right to maintain this action.....	86
Authorities cited.....	87
This proviso is a contract that the courts can and will enforce.....	87—88
Authorities cited.....	88—89
Discussion of authorities.....	89—90
Distinction as to the interveners in the Ore- gon case and the appellant in this action.....	90—93
Conclusion	93—94

TABLE OF CASES CITED.

	PAGES
A.	
Amer. & Eng. Enc. of Law (Vol. 26, pp. 620, 623)	43
B.	
Barden v. N. P. R. R. Co. (154 U. S. 325)	32, 87
Burke v. S. P. R. R. Co. (not published)	33, 57
Baker v. Metropolitan Ry. Co. (31 Beavens R. Eng. 504)	89
C.	
Charles River Bridge Co. v. Warren Bridge Co. (36 U. S. 543)	45
Church of Holy Trinity v. U. S. (143 U. S. 457)	45, 53, 58
Civil Code of Cal. (Secs. 778, 773)	64, 69
Cooper v. Sioux City & P. R. R. Co. (Vol. 1, L. Dec. 349)	86
D.	
Davis v. Bohle (92 Fed. 328)	58
Doe, ex Dem, Patterson v. Winn (24 U. S. 385) .	49
Dubuque & P. R. R. Co. v. Litchfield (64 U. S. 66)	32, 52
Duffy v. Kelley (55 N. J. 627)	89
F.	
Fortieth Con. (Con. G. 2nd Sess. 371, 657), (3rd Sess. 463), (3rd Sess. Appen. 70)	42
Forty-first Con. (Con. G. 1468, 1470, 1946, 1954, 1955, Appen. 193)	40

	PAGES
Forty-first Con. (Con. G., 2nd Sess. 1776, 4638) .	39
Fry on Spec. Performance (5th Ed., Sec. 353) ..	89
Fowlkes v. Waggoner (46 S. W. 586)	67
G.	
Green County v. Quinlan (211 U. S. 594)	53
H.	
Hall v. Russell (101 U. S. 504)	81, 85
Hammond v. Rd. Co. (S. C. 33)	65
Heydenfeldt v. Daney G. & S. Mining Co. (93 U. S. 638)	58
Hamilton v. Rathbone (175 U. S. 414)	45
I.	
<i>In re</i> Moore (66 Fed. 950)	50
K.	
Kohlsaat v. Murphy (96 U. S. 153)	45, 49, 58
Knoxville Water Co. v. Knoxville (200 U. S. 33)	32
L.	
Leavenworth R. R. Co. v. U. S. (92 U. S. 740) .	30, 32
Lewis' Sutherland Stat. Con. (2nd Ed., Sec. 284, 443, 448, 548, 879)	45
Liverpool & London Globe Ins. Co. v. Kearney (94 Fed. 316)	58
Lockridge v. McCommon (90 Tex. 238)	66
Lynch v. Okla. (13 Okla. 147)	87
Mills <i>et al.</i> v. County of St. Clair (49 U. S. 570)	32
Memorial of California (2nd Sess. 41st Con., Con. G. 630)	41
Mo. etc. Ry. Co. v. Kans. P. Ry. Co. (97 U. S. 497)	31, 32

	PAGES
N.	
N. P. Rd. Co. v. Trodrick (221 U. S. 208).....	87
O.	
Oregon & C. R. R. Co. v. U. S. (59 L. Ed. 917)31, 34, 38, 56, 61, 72, 73, 74, 75, 90	
Oates v. First Natl. Bank (100 U. S. 239).....	47
O'Brien v. Miller (168 U. S. 297).....	51
P.	
Pennoyer v. McConnaughy (140 U. S. 1).....	79
Platt v. U. P. R. R. Co. (99 U. S. 58).....	32, 86
Plummer v. Murray (51 Barbour 202).....	50
Pomeroy on Spec. Perform. (Secs. 151, 158)..	88
Preston v. Browder (1st Wheaton 121).....	42
R.	
Reiche v. Smythe (80 U. S. 162).....	50
Ryan v. Carter (93 U. S. 78).....	49
S.	
St. Paul M. & M. Ry. Co. v. Greenhalgh (26 Fed. 568).....	30, 32
Sales v. Barber Asphalt Pav. Co. (66 S. W. [Mo.] 979).....	50
State v. Gearheardt (33 L. R. A. [Ind.] 313)...	50
Saxonville Mills v. Russell (166 U. S. 13).....	45
San Pedro Tin Co. v. U. S. (146 U. S. 132)..	87
San Jacinto Tin Co. v. U. S. (125 U. S. 283)..	87
Schullenberg v. Harriman (88 U. S. 62).....	32
Scott v. Latimer (89 Fed. 846).....	58
Sioux City etc. v. U. S. (159 U. S. 360).....	32
Slidell v. Grandjean (111 U. S. 437).....	32
Smith v. Smith (23 Wis. 181).....	65
S. P. R. R. Co. v. U. S. (168 U. S. 29).....	30
S. P. R. R. Co. v. U. S. (183 U. S. 529).....	30

	PAGES
S. P. R. R. Co. v. U. S. (189 U. S. 448).....	30
S. P. R. R. Co. v. U. S. (223 U. S. 564).....	30
T.	
Taylor v. McCowen (154 Cal. 803).....	68
Towle v. Remsen (70 N. Y. 312).....	66
Third Gray (Mass. 148, 149).....	67
Town of Highgate v. State (7 Atl. Rep. 898)...	50
U.	
U. S. v. Bashan (50 Fed. 754).....	58
U. S. v. Central Pac. R. R. Co. (118 U. S. 235)	53
U. S. v. Fisher (2 L. Ed. 318).....	45, 48, 58
U. S. v. Freeman (11 L. Ed. 562).....	45
U. S. v. Midwest Oil Co. (59 L. Ed. 309)....	85
U. S. v. Oregon & C. R. R. Co. (186 Fed. 892)	32
U. S. v. Mo. etc. Ry. Co. (141 U. S. 378)....	87
U. S. v. S. P. R. R. Co. (146 U. S. 595).....	30
U. S. v. Union Pacific (91 U. S. 72).....	42
United Society v. Eagle Bank (7 Conn. 469)..	50
U. S. Security & Bond Co. v. Riddle (18 Colo. App. 107).....	89
V.	
Van Duren v. Robinson (16 N. J. 260).....	89
Vierbo v. Friedlander (120 U. S. 707).....	47
W.	
Washburn on R. P. (Secs. 970, 1640).....	70
Winona & St. Peter R. R. Co. v. Barney (113 U. S. 625).....	31
Wisconsin Cen. R. R. Co. v. Forsythe (159 U. S. 55)	30, 32, 48
Wisconsin Cen. R. R. Co. v. U. S. (164 U. S. 205)	48
Williams v. Jones (166 N. Y. 537).....	67

No. 2638.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

October Term, 1915.

Geo. S. Fullinwider,

Complainant and Appellant,

vs.

**The Southern Pacific Railroad Com-
pany of California, et al.,**

Defendants and Appellees.

BRIEF FOR COMPLAINANT AND APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the decision of the United States District Court for the Southern District of California, Southern Division, sustaining the defendants' motion to dismiss the complainant's cause of action and bill of complaint.

On the 23rd day of November, 1914, the complainant filed herein his amended bill in equity. [Record, p. 7.]

On the 18th day of December, 1914, the defendants, the Southern Pacific Company, a corporation; the Southern Pacific Railroad Company of California, a corporation; and the Imperial Valley Farm Lands Association, a corporation of California, filed their motion in said court to dismiss complainant's amended bill in equity. [Record, p. 15.]

On the 21st day of December, 1914, the defendant, the California Land & Water Company, filed its motion to dismiss complainant's amended bill in equity. [Record, p. 6.]

On the 26th day of January, 1915, the defendant, the Central Trust Company of New York, filed its motion to dismiss complainant's amended bill in equity. [Record, p. 6.]

On the 18th day of January, 1915, the defendant, the Equitable Trust Company of New York, filed its motion to dismiss complainant's amended bill in equity. [Record, p. 6.]

That on the 5th day of April, 1915, the complainant and all of the defendants appeared in court by their respective solicitors and counsel and said motions were all submitted to the court, and the court, after hearing the arguments of counsel and being fully advised in the premises, sustained the motions of defendants and each of them in its general order and judgment was entered in this case without leave for the complainant to amend his complaint. [Record, p. 6.]

The propositions involved in this controversy are a construction of the acts of Congress of July 27, 1866

(14 S. at L. 292), and March 3, 1871 (16 S. at L. 573), and May 2nd, 1872 (17 S. at L. 59).

The act of July 27, 1866, was an act incorporating the Atlantic and Pacific Railroad Company and to aid in the construction of its road, and contained the usual provisions that were incorporated in all of these acts of Congress making grants to aid in the construction of their roads.

The act of March 3, 1871, and the act supplementary thereto of May 2, 1872, were acts incorporating the Texas & Pacific Railroad Company and to aid in the construction of its railroad, with the usual terms and conditions that were incorporated in all of the railroad grants also.

The questions involved in this action is the construction of sections 3 and 18 of the act of July 27, 1866.

Section 3 of said act is as follows:

“And be it further enacted: That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes

through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said "Atlantic & Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may

be selected as above provided: And provided further, that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' "

Section 18 of the act of July 27, 1866, is as follows:

"And be it further enacted: That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

14 Stat. at L. 292.

And sections 9 and 23 of the act of March 3, 1871.

Section 9 of said act is as follows:

"That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on

each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word 'mineral' where it occurs in this act shall not be held to include iron or coal: Provided, however, that no public lands are hereby granted within the state of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the land originally granted. The term 'ships channel,' as used in this bill, shall not be construed as conveying any greater right to said

company to the water front of San Diego bay than it may acquire by gift, grant, purchase or otherwise, except the right-of-way, as herein granted: And provided further, that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

Section 23 of said act is as follows:

"That, for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California (subject to the laws of California) is hereby authorized to construct a line of railroad from a point at or near Tehachapi Pass by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six, provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

16 Stat. at L. 573.

The complainant avers in his amended bill in equity after the usual formal allegations as to the character

and corporate capacity of the defendants, substantially as follows:

That there was granted to the defendant, the Southern Pacific Railroad Company of California, by the act of Congress of March 3, 1871, under and by virtue of section 23 of said act, the following described tract of land, together with other lands, to-wit:

The south one-half of section five (5), township eleven (11) south, range fourteen (14) east, San Bernardino Base and Meridian, lying and situate in the county of Imperial and state of California.

The complainant further avers that said grant was made upon a condition and subject to the proviso contained in the latter part of section 9 of the act of March 3, 1871, which was in words and figures as follows, to-wit:

“And provided further, that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all lands herein granted.”

16 Stat. at L. 573.

The complainant further avers that said Southern Pacific Railroad Company of California had completed its road more than ten (10) years prior to the commencement of this action and that the above described tract of land had not been sold or otherwise disposed

of by the defendants within three years after the completion of its entire road.

The complainant further avers that the lands above described were lands that the defendant, the Southern Pacific Railroad Company, was qualified to acquire from the government under said grant and were within the place limits of said grant.

The complainant further avers that he has tendered to the defendants the sum of \$2.50 per acre or eight hundred dollars in gold coin of the United States and thereupon demanded of the defendants a conveyance by the defendants to the complainant of all their right, title and interest in and to said lands which demand was by the defendants refused.

The complainant further alleges that said lands and the subject of this controversy exceed in value the sum of three thousand (\$3,000.00) dollars.

The complainant further alleges that he was eligible and qualified at the time of filing his original bill in equity herein, and also at the time of filing his amended bill in equity and still is, to settle upon and pre-empt public lands of the United States and was a duly qualified entryman under the desert land laws of the United States and was and is duly qualified to purchase said lands under said acts of Congress above referred to in amounts not to exceed three hundred and twenty acres.

The complainant further avers that he offers to pay into court the sum of eight hundred dollars to be paid to the defendants or such one of the defendants as the court may determine is the one entitled to receive said

money, upon the execution to him of a proper conveyance to said premises.

The complainant further avers that he was informed and believes it to be true that the other defendants, aside from the Southern Pacific Railroad Company of California, and each and every one of them have or claim some interest in or to the subject-matter of this action, the exact character or nature of which the complainant was and is unable to state, but demands that whatever interest said defendants or any of them have in or to the subject-matter of this action, that they be compelled to come into court and set up that interest.

The complainant in his amended bill in equity asked the court:

First: That a construction and interpretation be made by it of said sections of said acts of Congress, and especially of sections 9 and 23 of the act of Congress approved March 3, 1871, together with the supplementary act passed by Congress on May 2nd, 1872, and all other acts that have any relation to the application and construction of the act of March 3, 1871.

Second: That it be adjudged and ordered by the court that the defendants, upon the payment into court of the amount of eight hundred dollars, tendered to it for said land, be compelled to convey to the complainant all their right, title and interest in and to the lands hereinbefore described.

Third: That the complainant have such other and further general relief as in equity and good conscience he is entitled to. [Record, p. 7.]

To this amended bill in equity the Southern Pacific Railroad Company and the Imperial Valley Farm Lands Association filed the following motion to dismiss the action and bill. Said motion, omitting the formal parts, being in words as follows, to-wit:

“This court is without jurisdiction of the subject-matter of said action, and is without jurisdiction to hear or determine said cause on its merits.

“That said bill of complaint does not state facts sufficient to constitute a cause of action in equity or otherwise or at all.” [Record, p. 14.]

And all the other defendants entered their appearance and filed a motion to dismiss, substantially in the same language, as hereinbefore referred to. All of said motions were submitted together and ruled upon by the court in one order or decree.

On the 26th day of April, 1915, omitting the formal parts, the following decree was signed, entered and recorded in this action, to-wit:

“This cause having come on to be heard at this term on the 5th day of April, 1915, on the motions of the defendants to dismiss the amended bill of complaint, and having been argued by counsel for the respective parties at said time, and the court having at said time ordered that said motions to dismiss be sustained without leave to amend:

“Now, therefore, it is hereby ordered and decreed that said amended bill of complaint be, and the same is hereby finally dismissed, and judgment is hereby given the said defendants for their costs in this suit in the

sum of thirty-four 40/100 (\$34.40) dollars.” [Record, p. 17.]

(Signed) BENJAMIN F. BLEDSOE,
District Judge.

The appellant, Geo. S. Fullinwider, has appealed to this court from the judgment and decree of the District Court as hereinbefore set out. [Record, p. 38.]

ASSIGNMENT OF ERRORS.

The complainant and appellant filed seventy-three assignment of errors.

It is unnecessary to set forth at length all of these assignment of errors. They are sufficiently full to raise all questions of law which are presented by the pleadings and they challenge the correctness of each of the particular matters adjudged and decreed by the court. [Record, p. 18.]

This complainant and appellant calls attention to some of the assignment of errors as follows:

1. The court erred in sustaining the motion to dismiss of the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company and the Imperial Valley Farm Lands Association to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

2. The court erred in sustaining the motion to dismiss of the defendant, the Central Trust Company, to the amended bill of the complainant and directing that

said amended bill be dismissed for want of equity in said amended bill.

3. The court erred in sustaining the motion to dismiss of the defendant, the Equitable Trust Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

4. The court erred in sustaining the motion to dismiss of the defendant, the Southern Pacific Land Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

5. The court erred in sustaining the motion to dismiss of the defendant, the California Land & Water Company, to the amended bill of the complainant, and directing that said amended bill be dismissed for want of equity in said amended bill.

6. The court erred in sustaining the motion of the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, and the Imperial Valley Farm Lands Association, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

7. The court erred in sustaining the motion of the defendant, the Central Trust Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

8. The court erred in sustaining the motion of the defendant, the Equitable Trust Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

9. The court erred in sustaining the motion of the defendant, the Southern Pacific Land Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

10. The court erred in sustaining the motion of the defendant, the California Land & Water Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

* * * * *

16. The court erred in that it did not hold that the amended bill of complaint of the complainant stated a good cause of action to which the defendants and each of them should be required to file their answer or plea.

17. The court erred in entering a decree in favor of the defendants, dismissing the complainant's amended bill and entering judgment against complainant in favor of the defendants for their cost and disbursements herein.

18. The court erred in not granting to said complainant the relief prayed for by him in his said amended bill.

19. The court erred in not granting to said complainant any equitable relief.

(a) As said amended bill contains allegations and matters entitling said complainant to equitable relief.

(b) Said amended bill contains allegations and matters entitling the said complainant to the relief prayed for in said amended bill.

* * * * *

21. The court erred in not holding that the proviso in section 9 of the act of Congress of March 3, 1871, was a conditional limitation. Said proviso in section 9 of said act is as follows:

“That all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted.”

22. The court erred in not holding that the said proviso copied in assignment No. 21 was a conditional limitation.

That the happening of the conditions subsequent therein specified entitled the complainant herein to a specific performance of said contract upon the payment to the defendants of the amount of \$2.50 per acre.

23. The court erred in holding that there was not jurisdiction in the court on the equity side to enforce a specific performance of said contract on behalf of

the complainant upon the happening of the conditions subsequent in said proviso of section 9 of said act of Congress of March 3, 1871.

24. The court erred in not holding that the proviso in section 9 of the act of March 3, 1871, providing "that said lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands," was sufficiently definite to be enforced as a conditional limitation.

25. The court erred in not holding that the proviso in section 9 of the act of March 3, 1871, was a binding contract upon the defendants and each of them, by which they and each of them were obligated to convey all interest they had in said land described in complainant's amended bill, upon the payment by the complainant to them or to whichever one of the defendants the court should direct the same should be paid to, of \$2.50 per acre.

26. The court erred in not holding that this suit can be maintained by complainant as one to enforce a specific performance of said contract or proviso.

(a) The defendants hold the legal title to and the possession of the said granted lands.

(b) Complainant having asked for specific performance, equitable relief may and can be granted him by specific performance.

27. The court erred in not holding that the provisions of said act of March 3, 1871, making said land grants, wherein it was provided "that all lands not sold or otherwise disposed of within three years after

the completion of the entire road should be subject to settlement and pre-emption like other lands, etc.," were both positive and negative, requiring the grantees and especially these defendants and each of them to sell to this complainant and to settlers who should apply to buy and who were eligible to settle upon or pre-empt public lands, at a price not greater than an average of \$2.50 per acre, and requiring said defendants to refrain from selling any of the granted lands to other than persons eligible to settle and pre-empt public lands, in such quantities as is provided by law for the disposition of public lands and at a price not greater than an average of \$2.50 per acre.

* * * * *

31. The court erred in not holding that the proviso in section 9 of the act of March 3, 1871, was designed to devote said lands conveyed by said grants "that had not been sold or otherwise disposed of by the defendants within three years after the completion of the entire road," to settlement and to prevent the monopoly of said lands. That said grant was a law as well as a grant, that said defendants could not defeat the purpose of the proviso requiring sales to settlers and pre-emptors, by themselves monopolizing and holding the lands and by refusing to sell at all or by refusing to sell any of them except to such persons and in such quantities and at such prices as they or either of them saw fit.

32. The court erred in holding that the proviso in section 9 of the act of Congress of March 3, 1871, was not a conditional limitation, the acceptance and agree-

ment to perform which was imposed by Congress as a condition precedent to the right of the defendants or either of them to accept and become vested with the title to the lands under the grant of March 3, 1871.

* * * * *

34. The court erred in refusing to enter a decree of specific performance on behalf of Geo. S. Fullinwider, the complainant herein, and against the defendants, the Southern Pacific Railroad Company of California and each and every one of the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to the complainant the lands sought to be purchased by him, upon payment to them of the purchase price therefor, of \$2.50 per acre.

* * * * *

37. The court erred in refusing to direct and decree a specific performance on behalf of the complainant against the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to said complainant the lands sought to be purchased by said complainant as prayed for in his amended bill.

38. The court erred in holding that the proviso in said grant did not constitute a contract entered into by and between the defendant, the Southern Pacific Railroad Company of California, and the government, for the benefit of and enforceable by, the complainant.

39. The court erred in holding that the proviso in section 9 of the act of March 3, 1871, providing "that

said lands should be subject to settlement and pre-emption like other lands, that were not sold or otherwise disposed of by the defendants within three years after the completion of the entire road," was not a conditional limitation for the use and benefit of this complainant and those who in good faith, being eligible to make settlement and pre-empt public lands, who should apply to make settlement upon said lands and to purchase the same in quantities and at the price provided by said act.

40. The court erred in holding that the defendants, by the provisions of said grant contained, did not take in all lands still held by them under said grant which had not been sold or otherwise disposed of as provided, etc.," a conditional limitation estate therein for the use and benefit of the complainant.

(a) The nature and quality of said interest in said grant are sufficiently specific and definite.

(b) The application to purchase, and tender of payment, and being eligible to make settlement and pre-emption on public lands is a sufficient identification.

41. The court erred in not holding that the offer and tender of the complainant to purchase the lands described by him in his amended bill of complaint, from the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under it, gave to the complainant a vested right in said lands in default of acceptance of such offer and a conveyance to him by the defendants.

42. The court erred in not holding that the proviso

in the act of March 3, 1871, is sufficiently definite and certain to be endorsed as a conditional limitation.

* * * * *

45. The court erred in not holding that the proviso in the act of March 3, 1871, was a conditional limitation, impressed upon and running with the title to the land until the title should have ultimately become vested in a settler upon the terms and under the conditions provided in said grant.

* * * * *

49. The court erred in not holding that Geo. S. Fullenwider, the complainant herein, was entitled to the relief prayed for in his amended bill herein or to any relief, and in holding that said amended bill of complainant should be dismissed.

50. The court erred in not holding that the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, individually and collectively, any or either of them, had violated the provisions of said act of Congress of March 3, 1871, relative to settlement and pre-emption of said lands by denying complainant's right under said act.

* * * * *

52. The court erred in not holding that said proviso in section 9 of the act of March 3, 1871, is enforceable by the complainant.

53. The court erred in not holding that it was impossible for the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company, and the California Land & Water Company, or any or either of them, to receive said grant with the same "rights, grants and privileges" as those contained in the act of July 27, 1866, for the reason that the time within which they were required to perform the conditions of sections 8 or 12 of said act were not extended.

53½. The court erred in holding that under section 23 of the act of March 3, 1871, the Southern Pacific took said grant under the act of July 27, 1866.

(a) That said act of July 27, 1866, is not sufficiently designated by said section in order for the court to determine just what act of 1866 was referred to.

(b) That the reference of section 23 of said act of March 3, 1871, to the act of 1866 is too indefinite and uncertain.

54. The court erred in holding that the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, individually or collectively, or any or either of them, were not

bound by all of the terms and conditions or the whole of the act of Congress of March 3, 1871.

55. The court erred in not holding that the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company, and the California Land & Water Company, individually or collectively, or any or either of them, took said grant with all the "rights, grants and privileges, and subject to all of the limitations, restrictions and conditions" of the act of March 3, 1871, as well as any limitations, restrictions and conditions contained in the act of July 27, 1866.

* * * * *

60. The court erred in not holding that the complainant, being eligible to make settlement and preempt public lands, had a right to enforce specific performance of contract from the defendants, the Southern Pacific Railroad Company of California or any of the defendants claiming an interest in it, or claiming by, through or under it, upon payment to them of \$2.50 per acre.

* * * * *

65. The court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and its successors in interest, and the defendants, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the

Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, and any or either of them, under said land grant of the act of March 3, 1871, in any event, were required to sell all the lands not otherwise sold or disposed of within three years after the completion of the entire road, etc., to citizens eligible to make settlement and pre-emption of public lands.

66. The court erred in not holding that the proviso in the act of March 3, 1871, and the acts amendatory thereof were operative and enforceable laws and contracts and required the defendants to sell said lands to persons only eligible to make settlement and pre-emption in such quantities as is provided by law for the distribution of the public land and at a price not to exceed an average of \$2.50 per acre, and that it prohibited them or either or any of them as to all lands remaining unsold three years after the completion of the entire road, to sell to persons other than those eligible to make settlement and pre-emption upon public lands.

67. The court erred in not holding that Congress had waived all of the preliminary steps necessary for actual settlers to take in order to acquire a right in the public domain except that of paying to the defendants the purchase price for said land not to exceed an average of \$2.50 per acre.

* * * * *

69. The court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in

said land or claiming by, through or under it, had violated said law and contract which they entered into when they accepted said grant under the act of March 3, 1871, and had thereby defeated the primary object, purpose, intent, and settled policy of Congress in regard to public lands involved in these land grants and especially in this one.

70. The court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and the defendants claiming an interest in said lands so granted or any of the defendants claiming by, through or under it, had waived their right to fix a price upon said lands other than an average of \$2.50 per acre and should be compelled to convey the same upon payment to them of the maximum price of \$2.50 per acre by this complainant.

71. The court erred in not holding that Congress has the absolute control over the settlement, sale and distribution of the public lands and that it has the power to waive any and all of the preliminary steps that might be required to be taken to initiate on the part of a settler or pre-emptor, a vested right to public lands, and that it did, under the terms and conditions of the act of March 3, 1871, waive all of the preliminary steps and conditions required of settlers and pre-emptors to be done, except that they must be eligible to take public lands and must pay the defendants the purchase price, and that upon the happening of these two conditions, the equitable title to the land became vested in the complainant or settler.

72. The court erred in sustaining the defendants

and each of their motions to dismiss and directing that the complainant's bill be dismissed without leave to amend.

73. The court erred in sustaining the defendants and each of their motions to dismiss the complainant's bill and in not directing that said complainant be permitted to amend his bill within a time fixed by the court, or that the same should be dismissed. [Record, pp. 19-37.]

The issues raised by the defendants' demurrer or motion to dismiss, the character of the arguments advanced and the natural classification of the subject will be presented to the court under the following propositions or topics for discussion:

I.

WAS THIS GRANT OF LANDS TO THE SOUTHERN PACIFIC RAILROAD COMPANY UNDER THE ACT OF MARCH 3, 1871, MADE SUBJECT TO THE RIGHTS, GRANTS AND PRIVILEGES OF SAID ACT, OR UNDER THE RIGHTS, GRANTS AND PRIVILEGES OF THE ACT OF JULY 27, 1866, AND SUBJECT ONLY TO ITS TERMS?

II.

IF THE DEFENDANTS TOOK THIS GRANT UNDER THE TERMS AND CONDITIONS OF THE ACT OF 1871, WHAT IS THE CHARACTER OF THE ESTATE THEY BECAME VESTED WITH?

III.

WHAT RIGHTS WOULD THIS COMPLAINANT, WHO IS ELIGIBLE TO SETTLE AND PRE-EMPT PUBLIC LANDS, HAVE UNDER SAID ACT WHERE THE COMPANY HAD NOT SOLD OR OTHERWISE DISPOSED OF THE GRANTED LANDS WITHIN THREE YEARS AFTER THE COMPLETION OF ITS ENTIRE ROAD?

**Brief and Argument of the Appellant, Geo. S.
Fullinwider.**

The amount involved in the suit of this complainant and appellant is not so much, but the construction of the court in construing these statutes and the status and rights of the complainant and defendants under them are propositions that involve property worth many millions of dollars, between, perhaps, one and two million acres of land, much of it being land of great fertility and productiveness. For almost forty years the defendants have failed and refused to dispose of these lands to settlers at any price. The result has been that the improvement and development of these valleys, wherein these granted lands lie, has been obstructed and held back, to the great damage and detriment of settlers who were anxious to settle upon and improve these lands and make their permanent homes there; to the great damage also to the state of California, within whose boundaries these lands lie, the settlement and improvement of which would add many

desirable citizens to the state's population, add to her wealth by reducing to cultivation this vast area of valuable lands, and adding millions to her wealth in the way of reclaiming and increasing in value these waste desert lands, lastly depriving these defendants themselves of a perpetual asset which would grow in value yearly, by having this country settled and improved by thrifty and industrious people who would be continual and perpetual patrons of the road, to the amount of millions of dollars annually.

It is the earnest desire of this complainant and appellant that the court pass upon the crucial propositions herein presented by the defendant's demurrer or motion to dismiss and construe the acts of Congress involved herein, and thereby determine the status and rights of the parties.

The importance of having any question as to the title of these lands forever put to rest is so great and of such public interest and concern that it seems to us that there should be no delay in attempting on the part of both the complainant and the defendants, of getting a full and careful hearing of these questions and have them carefully considered by the court and a final adjudication entered, clearly defining the rights and status of all of the parties hereto in such a way that these valuable possessions may be no longer held back from settlement and development. The interests of the public, as well as of the parties to this litigation, it seems to us, urgently demand that a speedy and final determination and settlement of these titles should be adjudicated.

It is admitted by all parties and has been so adjudicated by the courts in a number of cases, that the Southern Pacific Railroad Company took the grant of the lands involved in this controversy under the act of March 3, 1871.

S. P. R. R. Co. v. U. S., 168 U. S. 29;

S. P. R. R. Co. v. U. S., 183 U. S. 529;

S. P. R. R. Co. v. U. S., 189 U. S. 448;

U. S. v. S. P. R. R. Co., 146 U. S. 595;

S. P. R. R. Co. v. U. S., 223 U. S. 564.

I.

Was this Grant of Lands to the Southern Pacific Railroad Company under the Act of March 3, 1871, made subject to the Rights, Grant and Privileges of said Act or under the Rights, Grants and Privileges of the Act of July 27, 1866, and subject only to its terms.

This proposition is rudimentary, that in construing acts of Congress, the courts will ascertain, if possible, what the intent of Congress was in passing these laws, and when that intent is ascertained, it must be carried out and given effect by the court. This rule has been settled by a number of authorities of the Supreme Court of the United States, and we shall content ourselves by simply citing the authorities:

Wisconsin Central R. R. Co. v. Forsythe, 159

U. S. 55, 40 L. Ed. 74;

St. Paul M. & M. R. R. Co. v. Greenhalgh, 26

Fed. 568;

Leavenworth R. R. Co. v. U. S., 92 U. S. 740,

23 L. Ed. 638;

Winona & St. Peter R. R. Co. v. Barney, 113
U. S. 625;

Mo. etc. Ry. Co. v. Kansas Pac. Ry., 97 U. S.
497, 24 L. Ed. 1095.

Justice Field, in the case of Winona & St. Peter Railroad Company v. Barney, *supra*, in the opinion says that it is not always an easy matter to determine this intent, and uses this language:

“We must look, in order to ascertain this intent, to the condition of the country when the acts were passed, as well as the purpose declared on their face, and read all parts of them together.”

The rules of construction on these public land grant acts or statutes of Congress are:

(a) They are to be construed as laws, and the rules which under common law control the construction of conveyances between private persons do not apply.

(b) These grants are all construed most strongly in favor of the government or the public and against the grantee.

These propositions at this time are rudimentary, having been passed upon by the courts so often it has become the rule of all of the courts of the country, and as was well said in the case of the Oregon and California R. R. Co. v. the United States, 59 L. Ed. 917:

“It is not necessary to review the cases cited respectively to sustain and oppose the contending arguments. The principles announced in the cases

are rudimentary, and may be assumed to be known, and the final test of their application to be the intention of the grantor.”

In support of these propositions, the following cases are also cited:

Dubuque & Pacific R. R. v. Litchfield, 64 U. S. 66, 16 L. Ed. 509;

Mills *et al.* v. County of St. Clair, 49 U. S., 12 L. Ed. 1207;

Leavenworth R. R. Co. v. U. S., *supra*;

Wisconsin Central R. R. Co. v. Forsythe, *supra*;

Mo. etc. Ry. Co. v. Kansas Pac., *supra*;

Sioux City etc. v. U. S., 159 U. S. 360, 40 L. Ed. 177;

Slidell v. Grandjean, 111 U. S. 437, 28 L. Ed. 321;

Knoxville Water Co. v. Knoxville, 200 U. S. 33, 50 L. Ed. 359;

Schullenberg v. Harriman, 88 U. S. 62, 22 L. Ed. 551;

Platt v. U. Pac. R. R. Co., 99 U. S. 58, 25 L. Ed. 424;

Barden v. Northern Pac. R. R., 154 U. S. 325, 38 L. Ed. 992;

U. S. v. Oregon & Cal. R. R., 186 Fed. 892;

St. Paul M. & M. Ry. Co. v. Greenhalgh, *supra*.

In order to arrive at what Congress had in mind and what it intended to do by the act of March 3, 1871, it is necessary to consider, in a brief way, certain his-

torical facts and legal propositions, in order to arrive at a correct construction of section 23 of this act.

This idea must be borne in mind at all times also that the act of March 3, 1871, was the last act ever passed by Congress making a grant of public lands to railroads.

Counsel for the defendants in the case of *Burke v. the Southern Pacific Railroad Company of California*, submitted to Judge Bledsoe, the trial judge in this case, on the 15th of February, 1915, in his brief filed in that case, uses this significant language:

“This section (section 23 of the act involved in this controversy) was not contained in the bill as originally introduced and was not added until just before the final passage of the act. At the time the bill was introduced all the great railroad grants had been made and Congress was not disposed to make any further grants. In fact, the Texas Pacific grant is the very last railroad grant that was ever made. It would have failed but for the general feeling that the Southern states should have an opening to the Pacific.”

He undoubtedly expresses the prevailing sentiment of the country in regard to these land grants to railroads as it existed at that date.

(1) HISTORY OF THE LAND LAWS.

The court should always consider and bear in mind two important policies of Congress developed by the experience of the country from its beginning up to the date of the passage of this act.

(a) The policy of Congress in regard to the public

domain and the history of the development of this policy.

(b) The policy of Congress in regard to making grants of public lands for internal improvements, including aid to railroads.

The history and development of these two policies have been so fully and carefully presented to this court and also to the Supreme Court of the United States recently in the case of the Oregon and California Railroad Company *et al.* v. the United States of America *et al.* (59 L. Ed. 917), that it does not seem to us that it is necessary to any more than briefly call the court's attention to the history and evolution of these policies.

The court, in the opinion in this case, said:

“The argument to support the contention is based first on the general considerations that experience had demonstrated to the country the evils of unrestricted grants, and that the bounty of Congress had been perverted into a means of enriching ‘a few financial adventurers,’ and that lands granted for national purposes ‘were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies.’ Informed by such experience, in substance is the contention, and solicited by petition and moved by the reasoning of some of its members, Congress changed its policy of unqualified bounty, and while not refusing to contribute to the aid of great enterprises, sought to prevent the perversion of such aid to selfish and personal ends, and to promote the development of the country by the disposition to actual settlers of the lands granted.”

At the establishment of this government the public lands were considered a public asset to be disposed of and the proceeds derived from the disposition of the same to be used in paying the government's debts and defraying its running expenses.

However, from the very beginning there was a strong minority sentiment in favor of utilizing the public lands for actual settlers, limiting the amount of land and the terms upon which these actual settlers could acquire the same. The sentiment in favor of retaining the public lands as a national asset was so strong, however, that in 1807 a law was passed by Congress making it a misdemeanor for anyone to settle upon any of the public lands except they had been purchased by public sale or were disposed of by them after having been exposed to public sale as was the original policy of Congress in disposing of the public domain. This law, however, remained practically a dead letter.

The struggle between the parties who favored the policy of retaining the lands as a national asset and those who favored the distribution of them among actual settlers was waged incessantly for forty years. During that time, not less than thirty acts of Congress were passed to relieve settlers who had located upon the public lands in violation of the penal statute making it a misdemeanor to so do.

PRE-EMPTION LAW.

In 1841 the first general law was passed by Congress giving citizen settlers, who desired and were

willing to occupy the lands for homes, the preferred right. This is what is popularly known as the "pre-emption law." This law immediately became very popular.

At first it only included certain portions of the surveyed public lands, but very soon amendatory laws were passed by Congress which made it applicable to all public lands in all parts of the country, surveyed or unsurveyed.

HOMESTEAD LAW.

Soon after the passage of the pre-emption law the agitation for a homestead law became very pronounced in the country, and between 1850 and 1860 the political parties incorporated planks in their platforms pledging themselves to give to the people a general homestead law. This homestead law was passed and became a law in 1862. It also was a popular measure with the people.

These laws have continued up to this day as a part of the general land law policy of the country, and have never been changed in any way except to expand and make more liberal their terms.

This briefly is the history of the public land laws as enacted by Congress, which could be elaborated upon very much. It shows how long and how hard a proposition it was to crystallize a sentiment to establish the rights of a free people who had established a government, to protect the best interest of its individual citizenship, and to enable it to distribute its resources fairly and equitably to its people.

DEVELOPMENT OF THE POLICIES OF CONGRESS IN REGARD TO THE PUBLIC DOMAIN AND DONATIONS OF PUBLIC LANDS TO RAILROADS.

The history of the grants of public lands in aid of railroads was enacted in three distinct periods.

The first period commenced with the Illinois Central grant to the state of Illinois on September 20, 1850, and ended with the grant to the territory of Minnesota on March 3, 1857.

All of these grants were made to the states or territories, to be used by them in encouraging internal improvements.

For more than five years, from March 3, 1857, until July 1st, 1862, there were no other grants in aid of internal improvements.

The second period commenced with the Pacific Railroads Bill on July 1st, 1862, and ended with the Stockton & Copperopolis grant of March 2, 1867.

Nearly all of these grants were made to federal corporations. For the next two years, from March 2, 1867, to March 3, 1869, there were no grants in aid of railroads or any other internal improvements.

The third period commenced on March 3, 1869, and ended on March 3, 1871. During this period only two railroad grants were made, the act of May 4, 1870, to the Oregon Central Railway Company, the same being the act involved in the Oregon case, *supra*, and the Texas Pacific grant, of March 3, 1871, which is the act involved in this cause.

EVILS OF UNRESTRICTED GRANTS.

The condition of the country from 1850 until the close of the Civil War, covering the first two periods of railroad grants, was such that the evils growing out of these unrestricted railroad grants had not been fully anticipated by the country. The wonderful development and expansion of the country in commercial and business ways, immediately following the Civil War were such that the evils resulting from these different unrestricted grants to these railroads showed up in a most prominent manner, especially in the Pacific railroad grants, and the sentiment of the country changed very rapidly and an opposition to these public grants to railroads became so strong that from March 3, 1869, up to the passage of this act in 1871, there was not a grant made or a grant revived or the time for fulfilling the conditions of a grant, extended by Congress that did not have attached to it a settler's clause restricting the railroad companies' right to sell the lands granted.

Subsequent to 1867, in the discussion of these questions in Congress, the sentiment was unanimous, as appears by the records of Congress, in favor of placing on these grants restrictions that they should be sold by the railroad companies to settlers only, in limited amounts and at a maximum price fixed by the acts.

These questions were exhaustively discussed in the brief of the government filed in the Oregon case, *supra*. They were also discussed and referred to in the elaborate opinion of Judge Wolverton in the Oregon case found in 186 Fed. at page 861.

The Supreme Court in the case of *Oregon & California Railroad v. The United States* (59 L. Ed. 917), recognized judicially the change of sentiment of the country in regard to the public land and railroad grant policies. In the opinion it uses this language:

“In the first grants to railroads there were no restrictions upon the disposition of the lands. They were given as aids to enterprises of great magnitude and uncertain success, and which might not have succeeded under a restrictive or qualified aid. However, the change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers. These purposes should be kept in mind and in their proper relation and subordination.”

This quotation establishes the fact that our highest court has recognized the change of policy that the legislation of the country has undergone in regard to these two important matters.

(2) HISTORY OF THE BILL OF MARCH 3, 1871.

The act of March 3, 1871, was introduced in the Senate on the 9th of March, 1870. (2nd Sess. 41st Con. C. Globe 1776.) On June 20, 1870, a substitute for the original bill was adopted and on June 27, 1870, the bill passed the Senate with a proviso in it in regard to settlers which was substantially the same as the proviso in the bill as it finally passed. (41st Con., C. Globe 4638.)

The original purpose of the act of March 3, 1871,

was to build a trunk line across the southern portion of our country as an act of justice to the South, there having been aid given to three trunk lines across the northern and central portion of the country. Doubtless this would not have been considered at all if it hadn't been for this act of justice that the northern representatives in Congress felt was due to the South.

When this bill was messaged to the lower house there was a strong opposition to it on the ground that the policy had been adopted by Congress that no more grants of public lands should be made to railroads. Other members took the position that they would, as an act of justice, favor the grant to the Texas Pacific for its trunk line across the country, but they would absolutely oppose any act giving any aid to any branch lines.

The lower house passed a substitute for the Senate bill near the close of the 41st Congress, in which they eliminated from the bill all of the branch roads. The bill was later referred to a conference committee, which attached to it section 23 of this act, and on the last day and in the last hours of the 41st Congress the conference report was adopted without argument or discussion.

The history of this matter and the discussions that grew out of it will be found in the records of the 41st Congress, 3rd Sess., Con. Globe 1468, 1470, 1911, 1946, 1954, 1955; 3rd Sess. Appen. 193.

The growing sentiment against these railroad grants was also shown in memorials that were passed by the legislatures of the different states, and numerous peti-

tions of the people, protesting against any further grants to railroads and urging Congress to take steps to forfeit the grants that had already been made, where the terms and conditions of the grant had not been carried out by the railroad company.

Among other memorials was one passed by the legislature of the state of California and presented to Congress by Senator Casserly on January 21, 1870, more than a year prior to the passage of this act in question. Among other things the memorial recited:

“That numerous tracts of land in the state, amounting to about thirteen million acres, are now owned or claimed by a few railroad companies under grants from Congress. That said lands comprise a very considerable portion of the agricultural lands of our state. That the holding of or claiming of said large tracts of lands by a few persons has proven very disastrous to the interests of citizens by preventing the development of our resources and the settlement of our state. And it is further represented that more than one-half of the said thirteen million acres claimed by the Southern Pacific Railroad Company by the provisions of the act of Congress passed July 27, 1866, that the lands claimed by them virtually covers every alternate section now belonging to the United States to the width of sixty miles, from the bay of San Francisco for a distance of about six hundred miles to the southern line of the state.” (2nd Sess. 41st Con., C. Globe 630.)

This referred to the original grant to the Southern Pacific Railroad Company and was passed by the legis-

lature of the state of California more than a year prior to the act involved in this controversy.

This shows pretty conclusively the prevailing sentiment of the state of California in regard to making any other grants to railroads of public lands lying in this state, and especially to this defendant.

As to the prevailing sentiment of the country at that time, see the proceedings in Congress during the 40th Congress, 2nd Sess., C. Globe 371, 637; 3rd Sess., Con. Globe 463; 3rd Sess. Appen. 70.

In the construction of laws and acts of Congress it is necessary to recur to the history and situation of the country to ascertain the reason as well as the meaning of their provisions.

In *Preston v. Browder*, 1st Wheaton 121, 4 L. Ed. 51, the court in the opinion said:

“In the construction of the statutory or legal laws of a state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable the court to apply with propriety the different rules for construing statutes.”

In the case of the *United States v. The Union Pacific Railroad Company*, 91 U. S. 72, 23 L. Ed. 228, the court in the opinion said:

“The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and it is frequently necessary, in order

to ascertain the reasons as well as the meaning of particular provisions.”

(3) THE DOCTRINE OF *IN PARI MATERIA*.

Another rule of construction which has been resorted to by the courts to enable them to determine the intent of the legislative body and what it had in mind when an act was passed, in order that that intent might be given effect, by placing that construction upon the legislative act, is the doctrine of *in pari materia*, that is, considering and construing together the laws that were passed during that period and contemporaneously with the time when the act to be construed was passed, legislating upon the same subject-matter involved in the act to be construed. In fact, the authorities seem to make it imperative upon the courts to reconcile and construe them together, acts passed governing the same subjects.

In Vol. 26 A. & E. Encyc. of Law, 620, the author announces the following proposition on this question:

“In arriving at the intent of the legislature in enacting a statute, not only must the whole statute and every part of it be considered, but where there are several statutes *in pari materia*, they are all, whether referred to or not, to be taken together, and one part compared with another in the construction of any one material provision.”

And further on page 623 he announces:

“Especially does this rule apply to statutes passed at the same session of the legislature. If such statutes are *in pari materia*, they must be

construed together, and if possible, all must be allowed to stand and effect must be given to each of them, regard being had to the intention of the legislature. So contemporaneous legislation, not precisely *in pari materia* with the statute to be construed, may be referred to on the question of intent."

How is it possible for the defendants to avoid the effect of this legal proposition? The grant to the Texas Pacific and the construction of the Texas Pacific was the primary object that Congress had in view by the act of March 3, 1871. The grant to the defendant, the Southern Pacific Railroad Company of California, was a part of this same act, and it could not be construed to be more than a secondary object that Congress had in view. If statutes that are passed at the same session of the legislature on the same general subject are *in pari materia* and must be construed together, how is it possible that different parts of the same act can be segregated and thus relieved from the conditions and limitations that follow if it was construed with the whole of the act of which it is a part? This fact alone would place a doubt upon the construction of section 23 of said act as to whether or not it referred, for its conditions and limitations and for the grant, to the act of July 27, 1866. When construed under the rules of construction, that must be invoked and the authorities supporting the same, which we will hereinafter call the court's attention to, it seems to us, it becomes impossible to construe this grant to the Southern Pacific as being effected by any other grant-

ing clause except that given under section 9 of the act of March 3, 1871, and subject to the proviso attached to said section.

In support of this proposition also see:

Hamilton v. Rathbone, 175 U. S. 414, 44 L. Ed. 219;

United States v. Freeman, 3 Howard, 11 L. Ed. 562;

United States v. Fischer *et al.*, 2 Cranch 400, 2 L. Ed. 318;

Saxonville Mills v. Russell, 116 U. S. 13, 29 L. Ed. 554;

Church of the Holy Trinity v. U. S., 143 U. S. 457, 36 L. Ed. 227;

Charles River Bridge v. Warren Bridge *et al.*, 36 U. S. 543, 9 L. Ed. 822;

Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 846;

Lewis Sutherland's Statutory Construction, 2nd Edition, section 284 and note, sections 443-448, 548, 879.

The court will not be bound by the strict letter of the law. If the purpose and well ascertained object are inconsistent with the precise rules of a part of an act, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole.

This was clearly announced in the case of the church of the Holy Trinity v. United States, *supra*. The court in the opinion said:

“It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words ‘labor’ and ‘service’ both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added ‘of any kind’; and further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force in this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit nor within the intention of the makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislature, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding the enactment or of the absurd results which follow from giving such broad meaning to the words, making it unreasonable to believe that the legislator intended to include the particular act.”

In the case of *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. Ed. 776, the court quoted with approval from Chief Justice Eustis as follows:

“A statute must be construed with reference to its object, to the legislation and system of which it forms a part, in order to ascertain its true meaning and intent; and if its purpose and well ascertained object are inconsistent with the precise words of a part, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole. *Commercial Bank v. Foster*, 5 La. Ann. 516. And in *Childers v. Johnson*, 6 La. Ann. 634, the court said: ‘It is a sound rule of interpretation, in construing an article of the code with reference to a subject-matter, to take into view the general system of legislation upon the subject-matter contained in the same work; and where a provision of the code is invoked in derogation of the common rule regulating the subject-matter, the intention so to derogate should be clear and beyond reasonable doubt. If an interpretation can be given to the particular article which, without doing violence to its terms, will make it harmonize with the general rules and the other provisions of the code regulating the subject-matter, such interpretation should be adopted.’”

In the case of *Oates v. First National Bank*, 100 U. S. 239, 25 L. Ed. 582, the court in the opinion said:

“The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention and not to defeat it by adhering too rigidly to the mere letter of the statute, or to

technical rules of construction, and we should discard any construction that would lead to absurd consequences.”

The following authorities also support these propositions:

United States v. Fisher *et al.*, *supra*;

Wisconsin v. Forsythe, 159 U. S. 55, 40 L. Ed. 74.

The acts of Congress in regard to the disposition of the public lands and also the acts of Congress in regard to the donation of public lands to railroads constitute a system of laws, are all *in pari materia*, and to be looked to as one statute in explaining their meaning and import. The same being modified by Congress from time to time, as experience and observation show that they were defective or failed to meet the ends and purposes Congress had in view.

In the case of Wisconsin Central R. R. Co. v. United States, 164 U. S. 205, 41 L. Ed. 404, the court in the opinion said:

“An intention to surrender the right to demand the carriage of the mails over the subsidized roads at reasonable charges would be opposed to the policy established by well nigh uniform Congressional legislation on the subject, and although there may have been departures from that policy in a few instances under exceptional circumstances, none of them justify the contention that such departure was intended here.”

In *Doe, ex Dem, Patterson v. Winn et al.*, 24 U. S. 385, 6 L. Ed. 501, the court in the opinion said:

“The land law of Georgia is comprised under several statutes, passed at different periods, varying and modifying the system occasionally, as policy required. But all being *in pari materia*, are to be looked to as one statute, in explaining their meaning and import.”

In the case of *Ryan v. Carter*, 93 U. S. 78, 23 L. Ed. 809, the court in the opinion said:

“If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the act of 1807, which is *in pari materia*. Congress passed various laws, from time to time, respecting the claims to lands in the territories of Orleans and Louisiana. These laws were modified as policy required; but they constitute one land system, are all *in pari materia*, and to be looked to as one statute in explaining their meaning and import.

In the case of *Kohlsaatt v. Murphy*, *supra*, the court in the opinion said:

“In the exposition of statutes, the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may

be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent.

“Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment; but the controlling rule of decision in applying the statute in any particular case is, that whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the legislature, except when the language employed will admit of no other signification.”

The proposition that laws *in pari materia* must be construed as if they formed parts of the same statute and were enacted at the same time is supported by the following authorities:

Plummer v. Murray, 51 Barbour (N. Y.) 202;
United Society v. The Eagle Bank, 7 Conn. 469;
Town of Highgate v. State, 7 Atlantic Rep. 898;
Sales v. Barber Asphalt Pav. Co., 66 S. W.
Rep. (Mo.) 979;
State v. Gearheardt, 33 L. R. A. (Ind.) 313;
Reiche v. Smythe, 80 U. S. 162, 20 L. Ed. 566;
In re Moore, 66 Fed. 950.

Words cannot be segregated from the entire context and construed as unambiguous. As to the elements

that enter into the question of determining whether or not there is ambiguity, the case of *O'Brien v. Miller*, 168 U. S. 297, 42 L. Ed. 472, is instructive. The court in the opinion said:

“There can be no doubt that, considered in themselves and alone, there is no ambiguity in the words found in the clause of the contract providing that ‘if during said voyage, an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, * * * this obligation shall be void. But the question presented involved not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then in every case it would be impossible to arrive at the meaning of a contract, in the event of a difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be

brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.”

Another case that is instructive upon the proposition that the courts will not follow the strict letter of the statute is found in the case of Dubuque & Pacific Railroad Company v. Litchfield, 64 U. S. 66, 16 L. Ed. 509, construing an act of Congress making a donation of land to the territory of Iowa. The uncertainty in the grant which afterwards arose, grew out of this language, “In a strip five miles in width on each side of said river.” The donation was made to assist the territory of Iowa in improving the navigability of the Des Moines river from its mouth to the mouth of the Racoon Fork where it emptied into the Des Moines River, it being contended on the one side that that included a strip of land on each side of said river from its mouth to the north line of Iowa. The other contention was that it included only a strip from its mouth to the mouth of the Racoon Fork, which was comparatively a short distance along said river through the territory of Iowa. There probably never was an act of Congress upon which as many cases reached the Supreme Court, challenging the construction of the language, as resulted from this one. Even the land departments of the federal government first would take one view of it and then the other, finally deciding that Congress could not have intended to grant any land except from the mouth of the river to the Racoon Fork.

In support of this proposition also the following cases are cited:

Church of Holy Trinity v. United States, *supra*;
Green County v. Quinlan, 211 U. S. 594, 53
L. Ed. 341;

U. S. v. Central Pac. R. R. Co., 118 U. S. 235,
30 L. Ed. 174.

(4) THE REASONABLE CONSTRUCTION OF THE LANGUAGE AND CONTEXT.

The language and reasonable and natural construction of section 23 of this act, together with the context, it seems to us, makes it impossible for the court to adopt the construction placed upon it by counsel for the defendants for the following reasons:

(a) There is no granting clause in section 23 by which was made any grant of public lands to the defendant, the Southern Pacific Railroad Company. Unless the granting clause of section 9 of said act is referred to by this section and adopted as making the grant to the Southern Pacific Railroad Company, there is no grant contained in section 23. It is not claimed that any grant to the Southern Pacific Railroad Company, for the purposes set out in section 23 of this act was contemplated or made by the act of July 27, 1866. If the Southern Pacific Railroad Company got any grant under the act of March 3, 1871, and section 23 of that act, it was under and by virtue of that act alone that it acquired said grant. The only manner in which section 23 can be construed as referring back to and effecting the grant to the Southern Pacific at

the date of the passage of this act of March 3, 1871, would be by implication. A grant or conveyance will never be inferred and upheld by implication. We contend that of necessity the court should and must hold that the Southern Pacific Railroad Company obtained this grant for the lands involved in this controversy under and by virtue of the act of March 3, 1871, and the granting clause of said act contained in section 9 thereof, and was therefore bound by all of the terms and conditions of said act.

(b) It was impossible for this grant to the Southern Pacific Railroad Company to have been taken under the act of July 27, 1866, for the reason that the time in which the company was to commence the construction of said road and the amount of construction that was to be made and completed each year was not extended by the act of March 3, 1871, nor was the time in which the railroad company was to accept in writing, under its seal, the grant of 1866 extended. These two propositions are established by sections 8 and 12 of the act of 1866, which are as follows:

Section 8:

“That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, etc.”

Section 12:

“And be it further enacted: That the acceptance of the terms, conditions and impositions of

this act by the said Atlantic & Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act and not afterwards, and shall be deposited in the office of the Secretary of the Interior."

In all of the Congressional acts reviving grants that had lapsed, Congress always deemed it necessary, as well as reviving the grant, to also extend the time within which the conditions precedent and subsequent should be performed. Section 23 makes no provision for extending the time within which the Southern Pacific Railroad Company could comply with the conditions in regard to accepting the grant and commencing the work or the amount of work that it was required to do each year, consequently it was absolutely impossible for it to have taken said grant under the *rights, grants* and *privileges* of the act of July 27, 1866. As a matter of fact they accepted said grant and commenced the construction of the road under the terms and conditions of the act of March 3, 1871, by simply filing their map of general location of the line.

By accepting any part of the act of March 3, 1871, the company, then, by all rules of construction, took the grant subject to all of the terms and conditions, rights and privileges of the act of 1871 and also under all of the terms and conditions of the act of 1866 which were not inconsistent with the privileges of the act of

March 3, 1871. It seems to us that this construction and conclusion is irresistible.

(c) If the language in section 23 of the act of March 3, 1871, is subject to the construction which the trial court placed upon the clause, "With the same rights, grants and privileges," without doing any violence to the language or rules of construction, it could also be construed as referring to the granting portion of the act of March 3, 1871, as contained in section 9 of said act. In other words, to give the language the benefit of a reasonable and the most liberal construction, and waiving all other arguments against construing it as referring to the granting clause of the act of '66 and admitting that it might, with equal propriety, refer to either the granting clause of the act of 1866 or the granting clause of 1871, which contains the settlers' clause, then the law which we have already cited and which the Supreme Court just recently, in the case of *Oregon & C. R. R. Co. v. United States*, *supra*, states is rudimentary, would be applicable, and that construction would be adopted which is most favorable to the public and against the defendants.

(d) Adopting the construction contended for by counsel for the defendants leads to absurd and irrational results and impugns the motives of Congress. It would certainly lead to ridiculous and absurd results in attempting to construe this section, to say that Congress meant and intended to load the primary purpose and object it had in mind in making this grant to the Texas Pacific, with this condition, and then give a large grant without any limitations, restrictions or

conditions to a branch road, a purely local proposition, to aid it.

- (5) THE ACTS OF CONGRESS MAKING GRANTS TO RAILROADS SHOW SETTLERS' CLAUSE ATTACHED TO EVERY GRANT AFTER MARCH 3, 1869, AND THE COURT WILL AVOID THAT INTERPRETATION THAT WILL LEAD TO ABSURD AND RIDICULOUS RESULTS.

The history of Congress shows that from March 3, 1869, up to the passage of this act of March 3, 1871, there wasn't a grant made or an old grant revived or extended that did not have attached to it a settlers' clause. This had become the settled policy of Congress. It was incorporated in all of the land grant bills after that day as a matter of course and without any discussion or objection. The sentiment of the country had become so strongly opposed to land grants to railroads that, as counsel for defendants well said, in his brief filed with Judge Bledsoe in the case of *Burke v. The Southern Pacific Railroad Company of California, supra*, it would have failed but for the general feeling that the Southern states should have an opening to the Pacific, and this was the very last railroad grant ever made. Would it not be absurd and ridiculous to place upon this act a construction, under these circumstances, that placed Congress in the position of reversing the unquestioned established policy by adding the settlers' clause to all of these land grants and also adding it to the main purpose which induced the act of 1871, and giving without any restrictions, limitations or condi-

tions, a large grant to these defendants. Congress never intended such an absurd and ridiculous result.

The Supreme Court in many different cases has held that the courts will avoid making a literal interpretation of a law where such results will follow. We will content ourselves by quoting from one authority and simply citing others that announce the same doctrine.

In the case of *Heydenfeldt v. Daney Gold & Silver Mining Company* (93 U. S. 638, 23 L. Ed. 995) the court in the opinion said:

“If a literal interpretation of any part of it would operate unjustly or lead to absurd results and be contrary to the evident intent of the act taken as a whole, it will be rejected; and there is no better way of discovering the true meaning of a law when there are expressions in it which are rendered ambiguous by their connection with other clauses than by considering the necessity for it, and the causes which induced the legislature to pass it. This interpretation, although seemingly contrary to the letter of the statute, is within its reason and spirit.”

Kohlsaat v. Murphy, supra;

Church of the Holy Trinity v. United States, supra;

United States v. Fisher, supra;

United States v. Bashan, 50 Fed. 754;

Scott v. Latimer, 89 Fed. 846;

Davis v. Bohle, 92 Fed. 328;

Liverpool & London Globe Ins. v. Kearney, 94 Fed. 316.

For the reasons already given this question cannot be dismissed by simply saying that the language used in this section is so plain and unequivocal that it does not impose upon the court the necessity of placing any construction upon it other than what the plain language imports.

There is no question of forfeiture or cancellation of the grant involved in this case. It is admitted that the defendants have earned the grant and that their title to the grant is perfect, subject to the limitations of the proviso which we contend applies to this grant. The crucial question is, "Did they take the grant subject to the proviso and the limitations of section 9 of the act of March 3, 1871":

"That all such lands, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

We insist upon upholding the grant, but urge that it was accepted by the defendants with the above restrictions and limitations and that they were bound by these, and that it is an enforceable covenant.

RECAPITULATION OF THE POINTS URGED TO ESTABLISH
THE FACT THAT THESE DEFENDANTS ACCEPTED
AND RECEIVED THIS GRANT, BURDENED BY THESE
LIMITATIONS AND CONDITIONS, AND ARE BOUND
BY THEM.

1. That the history of the legislation of Congress in regard to the public land policy and its policy in regard to land grants for internal improvements, and especially railroad grants, had been modified to the extent that all the later grants had incorporated in them the provision that all lands so granted should be sold to settlers only, in limited quantities and at limited prices, instead of an unlimited right to dispose of them as was given in the former grants.

2. The history of this act and the record of Congress made in regard to it from the time it was introduced until its final passage refutes every idea that the defendant, the Southern Pacific Railroad Company of California was to receive this grant on any other or more favorable terms than was given to the Texas Pacific Railroad Company.

3. The doctrine of *pari materia*, that is, construing this act with all other grant acts covering that period, as defining the policy of Congress on this subject, following the rule laid down in *Ryan v. Carter*, *supra*, in which the court said:

“If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the act of 1807, which is *in pari materia*. Congress passed various laws, from time to time, respecting the claims to lands

in the territories of Orleans and Louisiana. These laws were modified as policy required, but they constitute one land system, are all *in pari materia*, and to be looked to as one statute in explaining their meaning and import."

4. The context and the language of section 23 of said act, and giving it its reasonable and natural construction, warrants and demands the construction we contend for.

5. It was impossible for the defendant, the Southern Pacific Railroad Company, to have taken this grant under the act of 1866, for the reason that the time in which it was required to perform many of the conditions in that act were not extended by Congress, and for that reason it was necessary for it to accept the grant under some of the conditions of the act of 1871, and if for no other reason, by doing this, it became bound by all of the terms of the act of 1871.

II.

If the Defendants took this Grant under the Terms and Conditions of the Act of 1871, what is the Character of the Estate they became vested with?

The Supreme Court in the Oregon & C. R. R. v. U. S. case, *supra*, has settled the proposition that this proviso is an enforceable covenant and not a condition subsequent. This being true, and the defendants having complied with the conditions precedent which they were required to perform, the title to these lands became absolutely vested in them in fee simple.

These conditions precedent were:

(a) That it file its map of general location of its line according to the terms of the act of March 3, 1871, which it did.

(b) That it commence actual work of construction and continue the same until completed within the time named according to the terms of the act.

Practically the same language might constitute either a

“Condition subsequent,”

“Trust estate,”

“Covenant,”

“Conditional limitation estate.”

Which one of these estates are created by the language and terms used in the act of March 3, 1871, is to be determined by what Congress had in mind and intended when it passed the act. We have already reviewed the history fixing the policy of Congress in regard to the distribution of the public domain, and also of the grants of public lands to aid in the development of internal improvements; also all the facts and circumstances leading up to the passage of this act.

Congress attached these conditions to these grants to be enforced, and the courts, when these provisions have been before them, have so held, as we shall show by authorities which we shall later call the court's attention to.

Congress evidently did not intend to create an estate with a condition subsequent attached to it, such as most of these later grants had incorporated in them,

for this reason, that then the only one that could have taken advantage of it would have been the government in an action to forfeit the grant. If Congress had intended to create an estate with a condition subsequent, it would not have placed the government in this position, in case the defendants forfeited their rights to the grant, to have compelled it to have paid the company, before it could have successfully maintained an action to forfeit this grant, the sum of \$2.50 per acre for the land. Congress certainly never intended to place the government in a position where, if the defendants failed to perform the conditions attached to their grant, that the government, in order to forfeit the same, would have to pay them for their land.

The conditions are such also that it is hardly probable that Congress intended, by the terms of this act, to create a trust and to constitute the defendants the trustee for the benefit of persons who might desire to settle upon this land.

Attached to this absolute title was a limitation by which it was to have the absolute use and control of said property to sell and dispose of as it saw fit, for three years after the completion of the entire road. Then upon the happening of two conditional limitations which were attached, its interests and rights in and to said property terminated.

(a) That if it had not been disposed of within three years after the completion of the entire road, and

(b) That the land should be held for persons who were eligible to make settlement or pre-emption upon public lands, by paying to the company a price not to

exceed an average of \$2.50 per acre, to be fixed by and paid to the company.

The company did not sell this land within three years after the completion of its entire road, and this complainant and appellant is eligible to make settlement and pre-emption upon public lands, and has tendered to the company the amount of \$2.50 per acre for this land and has demanded a conveyance of the land. We contend that this act of Congress contains all of the elements of a conditional limitation and that the defendants should be compelled to carry out the spirit and letter of the law.

This character of estate has been adopted and incorporated into the real estate law of this country. It applies and is permissible whether the title is conveyed by devise, conveyance, or grant. It was adopted and incorporated into the Civil Code of California, where it has remained and still is a part of that Code. Section 778 of the Code is:

“A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate, and every such remainder is to be deemed a conditional limitation.”

The Civil Code controls the methods of devise, descent and alienation of real estate lying within the jurisdiction of the state. (Section 755 Civil Code.)

We insist that the estate created by this act is a conditional limitation. It is distinguished from a condition in this: A condition brings the estate back to

the grantor—a conditional limitation carries it over to a stranger. A condition terminates an estate—a limitation creates a new one. A conditional limitation is an estate unknown and impossible under the common law.

In the case of *Smith v. Smith*, 23 Wis. 181, the court in the opinion said:

“A limitation is conclusive of the time of continuance, and of the extent of the estate granted, and beyond which it is declared at its creation not to be intended to continue. Conditions render the estate voidable to entry. Limitations render it void without entry. If, upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to go to a third person. This is a limitation over, and not a condition, for if a condition, an entry by the grantor would be necessary; and he might defeat the limitation by neglecting to enter. A limitation is imperative and is determined by the rules of law. A condition not only depends on the option of the grantor, but it is also controlled by equity, if the grantor attempts to make an equitable use of it. The performance of a condition is excused by the act of God, or of the law, or the party for whose benefit it was made. A limitation determines the estate absolutely, whatever be its nature.”

In the case of *Hammond v. Rd. Co.*, S. C. 33, the court in the opinion said:

“What is the effect of a subsequent condition? There is a broad and wide distinction between a condition and a limitation. A limitation upon a condition, or, in other words, a conditional limita-

tion, is where the property is limited over to a third party, in case the condition be not fulfilled, denominated by Littleton 'A condition law.' Gen. Inst. 234. In such case the estate determines *ipso facto* that the contingency happens."

In the case of Lockridge v. McCommon, 90 Tex. 238, the court in the opinion said:

"The plaintiff in error claimed that the conveyance from Andrew and Annie Lockridge to Robert E. Lockridge created in the latter an estate in fee simple upon conditional limitation. Of this class of estates it is said: 'Conditional limitations could not exist at common law.' They arise only out of certain conveyances owing their existence to statutes the effect of which is to dispense with 'livery of seizen.'

* * * * *

"A conditional limitation is of a mixed nature, and partakes of a condition and of a limitation, as if an estate be limited to 'A' for life, provided that when 'C' returns from Rome it shall thenceforth remain to the use of 'B' in fee, it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited, and is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place the estate passes to the stranger without entry, contrary to the maxim of law, that a stranger cannot take advantage of a condition broken."

In the case of Towle v. Remsen, 70 N. Y. 312, the court in the opinion said:

"To constitute a conditional limitation, the limitations must be over to a third person. As in the

case stated in 2nd Black. Com. 155, land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until, out of the rents and profits, he shall make 500 pounds, and the like."

3rd Gray, Mass. 148, 149, the court in the opinion said:

"One material difference, therefore, between an estate in fee on condition and on a conditional limitation, is briefly this: that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him, as a present existing interest, transmissible to his heirs, while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time.

* * * * *

"Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over, on the happening of the prescribed contingency, to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or condition may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limitations include certain estates in remainder, as well as gifts and grants, which, when made by will, are termed executory devises, and when contained in conveyances to uses, assume the name of springing or shifting uses."

Williams v. Jones, 166 N. Y. 537;

Fowlkes v. Wagoner, 46 S. W. 586.

A further instructive authority upon an estate of this character, and which construes sections of the Civil Code of California is found in the case of *Taylor v. McCowen* (154 Cal. 803-4). The court in the opinion said:

“The next objection is that the suit involves the adjudication of a forfeiture of the estate of Charlotte Budd Armstrong in an action in equity. This, it is claimed, cannot be done, the proposition asserted being that ‘it is a universal rule in equity never to enforce either a penalty or a forfeiture.’ Numerous authorities are cited to this effect. It is claimed that the plaintiff was required to establish the fact that Charlotte Budd Armstrong, by removing from the land, had forfeited her estate; that it is necessary for him to begin an action for that express purpose, or to terminate her estate by an entry, and that until he has done so he cannot go into equity and quiet the title of his intestate to the said land, which, according to defendant’s contention, could only vest in his intestate by reason of the forfeiture. This objection assumes that the estate of Mrs. Armstrong was an estate upon conditions subsequent that can only be divested by an entry for condition broken, or by a judgment at law. The estate which, by the terms of the decree, was vested in Mrs. Armstrong was not an estate upon condition, but a conditional limitation. The happening of the condition does not, in contemplation of law, in case such as that before us, operate to forfeit the estate given to the first taker, but merely to determine it, that is, bring it to an end. Section 778 of the Civil Code is:

“‘A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.’

“Section 773 declares that:

“‘A fee may be limited on a fee upon a contingency, which, if it should occur, must happen within the period prescribed in this title.’

“The latter clause describes precisely the estate herein created in the intestate of the plaintiff. The distinction between conditional limitations, contingent remainders, and estates upon conditions subsequent, and the different consequences, as to the taking effect of the subsequent estate, is clearly set forth in 2nd Washburn on Real Property, 6th Edition, Sec. 1640.

* * * * *

“See also to the same effect 1st Washburn on Real Property, 6th Edition, Sec. 165; see also 2nd Washburn on Real Property, 6th Edition, Sec. 970; 4 Kent’s Comm., 127; *Miller v. Levi*, 44 N. Y. 494; *Stearns v. Godfrey*, 16 Maine 160; *Coppage v. Alexander*, 41st Ken. 2 B. Mon. 313; *Jewell v. Pierce*, 120 Cal. 83. The latter case is practically the same as the case at bar, and although the point here made was not raised, the suit to quiet title was treated by the court as a proper method of establishing a title in the owner of the subsequent estate. In the present case, therefore, no proceedings for a forfeiture, or by way of re-entry for condition broken, was required as a condition precedent to a suit in equity to establish the title. The estate of Mrs. Armstrong terminated, *eo instanti*, upon her removal from

the land, and that of the plaintiff's intestate immediately vested as a legal estate in possession."

This character of estate is defined by Washburn in his work on Real Property, sections 970 and 1640.

Under this grant the United States conveyed an absolute fee to the lands upon the two conditions precedent.

(a) That the company file its map of general location of its land within the time specified by said act, and,

(b) Build the sections and complete its road within the times specified in the act.

Upon these conditions being complied with by the company, the government parted with every interest it had in the land, both present and prospective, but it attached to the title a limitation that if the company had not sold or otherwise disposed of the lands within three years after the date of the completion of the entire road, all the said lands should be subject to settlement and pre-emption, the same as other lands, upon payment to the company of a price not to exceed an average of \$2.50 per acre. The company had from the time the lands were earned up to three years after the completion of the road to handle and dispose of these lands as it saw fit. After that its estate in said lands terminated and it could thereafter sell the lands only to persons eligible to settle upon or pre-empt public lands, upon being paid by them an average of not to exceed two dollars and fifty cents per acre.

Upon the happening of these two things, the expira-

tion of three years after the completion of the road, the land not sold or otherwise disposed of, and the offer of one who was eligible to make settlement and pre-emption to pay the company the purchase price of not to exceed an average of two dollars and fifty cents per acre, and is able to do it, the interest of the defendants in said lands terminated *co instanti*. As we have already seen, this grant is more than a conveyance. It is a law, and every word, phrase and sentence of it must be given effect. The company cannot avoid the effect of it by sitting down and refusing to make a price on these lands, or not offering them for settlement as provided by this act. It will not be permitted to defeat its plain objects and purposes in that way, but will be compelled to carry out the provisions of this law which it has solemnly accepted and consented to. The language of the law, the conditions surrounding its enactment, and the purpose Congress had in mind and intended in making this grant, clearly brings it within the spirit and letter of the law of conditional limitations, as defined in the law on that subject, and is supported by the authorities we have cited *supra*.

Every condition and limitation and element required are present. Under the facts and law we have already called the court's attention to, it seems to us that our conclusion that this is a conditional limitation is irresistible.

III.

What Rights would this Complainant, who is Eligible to Settle and Pre-empt Public Lands have under said Act where the Company had not sold or otherwise disposed of the Granted Lands within three years after the Completion of its Entire Road?

It becomes important to carefully compare and consider the provisos in the acts passed upon by the court in the case of Oregon & C. R. R. Co. v. United States, *supra*, and the proviso contained in the act of March 3, 1871.

The proviso in the act of April 10, 1869, is:

“And provided further, that the lands granted by the act aforesaid shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser and at a price not exceeding \$2.50 per acre.”

16 S. at L. 47.

The proviso in the act of May 4, 1870, is:

“Shall be sold by the company, only to actual settlers in quantities not exceeding one hundred sixty acres or a quarter section to any one person, and at prices not exceeding two dollars and fifty cents per acre.”

16 S. at L. 94.

The proviso in the act of March 3, 1871, is:

“And provided further: that all such lands, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at

a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted.”

16 S. at L. 573.

There is a marked distinction between the conditions contained in the acts of April 10, 1869, and May 4, 1870, which were before the court for interpretation and construction in the Oregon case, *supra*, and the conditions of the act of March 3, 1871, the act involved in this action.

Actual settlers were the persons named in the first two provisos, and the court, in the Oregon case, *supra*, in construing these words, said:

“‘Actual settlers’ are the words of the provisos, and we may assume actual settlers were contemplated and sales of the lands were restricted to them.”

Actual settlers are not mentioned in the act of 1871. So far as we have been able to ascertain there were just three grants which had provisos similar to the one involved here. They were the grant to the U. P. R. R. Co. on July 1, 1862 (Vol. 12, page 489); the act of May 31, 1870, to the N. P. Railroad Co. (Vol. 16, page 378); and this act of March 3, 1871, to the Texas Pacific Railroad. All other grants provided that all the lands granted should be sold to “actual settlers only.”

The provisions of the three grants above were much more liberal in the rights to the railroad. They granted the right to the railroads to dispose of the lands on

such terms and to such persons and in such quantities as they saw fit for a certain period after the completion of their road. After that the lands were to be sold to persons eligible to settle or pre-empt public lands.

Another marked distinction was that the companies were to be paid a maximum price for the land by the persons designated as having the right to purchase. The acts involved here made it the duty of the companies to fix the price not to exceed a certain maximum and to receive the same from the applicants offering to purchase,—another marked distinction.

Congress did not make these distinctions by accident. It doubtless had a well defined purpose in mind. It intended that these conditions should be enforceable. The court in the Oregon case, *supra*, has put to rest this contention, by holding that these provisos are enforceable covenants, and the courts will find some way to make them effective. On page 925 in the Oregon case, *supra*, the court in the opinion said:

“In conclusion we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions, and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants, but as laws, and accepted as both; granting rights, but imposing obligations,—rights quite definite, obligations as much so. The first had the means of

acquisition; the second, of performance, and as we have pointed out, whatever the difficulties of performance, relief could have been applied for, and, it might be, have been secured, through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to."

This language is very significant, and, it seems to us, throws much light upon the proper construction to give the proviso in the acts in the case at bar, and determines, it seems to us, the question that a way will and must be found by the courts to enforce the law and to avoid such a construction as will relieve the defendants from the limitations imposed and make of the law unenforceable covenants, and thus make the requirements impotent, and, as the court said, in the Oregon case, *supra*, on page 924:

"Instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain."

If the appellant and persons who place themselves in a like situation cannot maintain this action and enforce specific performance, will not the condition become a dead letter, and these defendants thus be able to defeat the intention and purpose of the law? In omitting the words "actual settlers" from this proviso, did not Congress intend to give some other and different rights to persons designated to acquire this land than was given to "actual settlers" under their provisos?

Counsel for the defendants contends that the provisions of this act are too uncertain and indefinite in three particulars.

(a) The beneficiaries are uncertain and it is impossible to determine who would have a right to purchase, under said law, the land.

(b) That it is too uncertain as to the subject-matter. No one could determine how much, up to the maximum one would acquire, that any one desiring to purchase might take.

(c) That the amount that a proposed purchaser should pay is not fixed and certain.

We contend that under the authorities which we shall hereafter call to the court's attention, that neither one of these objections is tenable. The class of citizens who are eligible to make settlement and pre-emption upon the public lands are particularly and definitely defined and described in the federal statutes. They are just as certainly known as are the heirs of "A" that may be living at his death. Each one of this class has the right to exercise this right to purchase these lands until the lands are exhausted, the only qualifications required are that he be eligible to locate upon public lands as a settler or pre-emptor.

In construing similar provisions in laws governing the initiation of rights in public lands, the courts have never denied to the proposed settler or locater that he could not acquire any right at all in lands because the law did not definitely fix the amount that he may acquire by such settlement or location. On the contrary, the courts have consistently held that a settler or

locator had a right to acquire any amount of land less than the maximum amount that he was permitted to acquire.

As to the price for which a proposed purchaser should pay for said lands, it was the duty of the company, under said law, immediately after the expiration of three years after the completion of its entire road, to offer said lands for sale to settlers at a price not to exceed an average of \$2.50 per acre. The company had this right and it was its duty immediately to exercise it. If it considered any of said lands so granted worth less than \$2.50 per acre, to apportion the price so that in the aggregate they should receive an average of \$2.50 per acre for the lands that remained unsold, and no more than that price. Instead of the company doing this, it has denied the contract and insisted that it was not bound by it, and has neglected and refused to offer said lands for sale to settlers at any price. The fact that the defendants have neglected and failed to comply with the terms of said law and offer said lands for sale at the time and at the price in said act fixed, it has waived its right to, at this time, insist that it have the privilege of apportioning the price for which said lands shall be sold to actual settlers, and when it is offered in good faith by persons who are eligible to purchase said land, the maximum price said law fixed for it, it should not be allowed to question the price, at this time, but be compelled to carry out this contract.

The acceptance of the grant under the terms and conditions of the act of Congress of March 3, 1871, by the Southern Pacific Railroad Company of California

made this act a formal standing offer, according to the terms of said act, and an invitation to all qualified citizens of the United States to become purchasers thereof, by paying to the company or its successors the maximum price for said lands, to-wit: \$2.50 per acre.

The legislature of the state of Washington passed an act on October 26, 1870, providing a method for the disposal of the swamp and overflowed lands inuring to her under the act of Congress of March 21, 1860. The provisions of section 3 of said act are quite similar to the provisions of the act of March 3, 1871, now under consideration. It provided as follows:

“The swamp and overflowed lands of this state shall be sold by said commissioner at a price not less than one dollar per acre in gold coin. Any person over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration to become a citizen of the United States as required by the naturalization laws, may become an applicant for the purchase of any tract or tracts of said swamp and overflowed lands, upon filing his application therefor (describing the tract or tracts he desires to purchase) by the actual survey.”

The act, the court will notice, allows any person over the age of twenty-one years and being a citizen of the United States, or having filed his declaration to become a citizen, as required by the naturalization laws, to become an applicant for the purchase of any tract or tracts of swamp and overflowed lands, upon filing his application therefor, describing the tract or tracts he desires to purchase by the actual survey. The court

will observe that the particular citizens that can exercise this right is not named nor is the particular piece of land or the quantity that he may apply for, or the price he has to pay for same, designated by the act, it being more general and uncertain in these provisions in these particulars than the act in question.

An action involving the construction of this statute was before the Supreme Court (140 U. S. 1, 35 L. Ed. 363), *Pennoyer v. McConnaughy*. The Supreme Court, in passing upon this case, in the opinion said:

“The position of the complainant below is, that as the swamp lands of the state were for sale, upon the terms and conditions mentioned in the act of 1870, a valid contract, binding upon both parties to it, was completed between the state and the applicant the moment a legal application to purchase was filed with the proper officer of the state and accepted by him.”

Quoting also, in said opinion, a part of the opinion of Judge Deady of the United States Circuit Court of the District of Oregon, in passing upon the case:

“The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal standing offer by the state of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract therefor with the board, and complying with the subsequent conditions of payment and reclamation.”

Justice Lamar, in commenting upon this part of Judge Deady's opinion, said:

"We think this view very forcible, and it would be conclusive to our minds but for the consideration which suggests itself that the bare application itself, unaccompanied by the very payment of any consideration, partakes somewhat of the nature of a pre-emption claim under the laws of the United States, with reference to which it has been held that the occupancy and improvement of the land by the settler, and the filing of the declaratory statement of such fact, confers no vested right upon him, as against the government of the United States, until all the preliminary acts prescribed by law, including the payment of the price, are complied with. But we do not deem it necessary to determine whether the court was correct in that view of the case, for, in our opinion, another element of the case is of sufficient importance to control its disposition. Even if no vested right accrued to the applicant, immediately upon the filing of his application and its acceptance by the authorities of the state, it is conceded on all hands that he acquired such a right upon the payment of the twenty per centum of the purchase price of the lands embraced in his application, if such payment was made in accordance with the law."

Referring to that part of this decision in which Justice Lamar speaks of it as partaking of the nature of a pre-emption claim under the laws of the United States, we would say that the Supreme and Federal courts have modified the former holdings of the Supreme Court, that a filing of itself did not give the

locater any equitable or vested right in the land, and these later decisions have broadened out to a considerable extent these former opinions, and they hold that the filing upon land that was subject to location by a qualified citizen gives to that citizen, in itself, an equitable and vested right which the government could not divest him of, in case he followed up such filing by performing all of the conditions that were required of a locater to do, in order to become vested with the absolute title to the land.

We also think these questions have been settled in the case of *Hall v. Russell* (101 U. S. 504, 25 L. Ed. 829.) The court there had under consideration for construction what was known as the "Oregon Donation Act." Section 4 of said act in part was as follows:

"That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the 1st day of December, 1851, now residing in said territory, or who shall become a resident thereof on or before the 1st day of December, 1850, should have the right to acquire him a half section to a section of said lands, according to the circumstances."

The court will observe that any one qualified under said provision had the right to acquire from half a section to a section of said lands. The land he might

acquire is uncertain and indefinite just as is urged that the law under the case at bar is uncertain. The controversy in that case was between persons who claimed to be actual settlers on the land. The court, in discussing the questions involved, on page 509 in the opinion says:

“The opening words of section 4 are: ‘That there shall be, and hereby is granted.’ This is appropriate language in which to express a present grant, but was well remarked by Mr. Justice Field for the court in *Missouri, Kansas & Texas Ry. Co. v. Kansas Pac. Ry. Co.* (97 U. S. 491), where he says: ‘It is always to be borne in mind in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of the Congress. There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time.

* * * * *

“Coming, then, to the present case, we find that the grantee designated was any qualified settler or occupant of the public lands * * * who shall have resided upon and cultivated the same for four consecutive years and shall otherwise have

conformed to the provisions of the act. The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant and his right to a transfer of the legal title from the United States became vested, but until he was qualified to take, there was no actual grant of the soil. The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and to maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory having the other requisite qualifications."

The defendants contend that there are certain preliminary steps that settlers or locaters upon public lands are compelled to take before they are entitled to have the land conveyed to them, and that until these preliminary steps are taken, no locater or settler is in a position to demand of the defendants a deed for the lands, even upon payment of the maximum price of \$2.50 per acre.

Congress certainly was not trifling when it annexed to these railroad grants the condition that the lands granted should be sold to settlers only, in limited quantities and at a maximum price.

When Congress passed this act it certainly meant that if the railroad company had any of these lands left three years after the completion of its entire road, that then it should sell these lands to persons eligible

to settle or pre-empt public lands, upon their paying to it an average of not to exceed \$2.50 per acre.

Contrary to most of the provisions in similar grants to this, the company was allowed to retain that much of an interest in these lands which it should be paid for when the same was claimed by any one eligible to settle upon the public lands. Congress certainly did not contemplate or intend that persons who were eligible and desired to acquire this land should commit a public offense by becoming a trespasser upon this land, which they would have to do if they undertook to initiate a right according to the homestead, pre-emption or desert claim acts, so that Congress must have waived all of the preliminary steps necessary to have been taken, if the land had remained a part of the public domain, and the only steps that would be necessary for those who are eligible to purchase these lands would be to pay the railroad company the money and demand from it a deed.

The fact that the government has parted with all its interest in these lands, and has no longer dominion or control over them, waives its right to demand of the settlers upon these lands that they shall occupy them a certain time and make certain improvements upon them before they can demand their titles. The government is the only authority and tribunal that can demand of settlers these things and can pass upon these preliminary steps, required to be taken. It can waive them or any other requirements through Congressional acts, and if it has waived its right to demand that they be done, or has placed itself in a position where it cannot

require them done, then the settler in this case would have a right to tender to the defendants the maximum amount Congress fixed for these lands to be sold at, or such less amount as the defendants might name, and upon the happening of that event, the interest of the company in that piece of land would immediately terminate, and it would have nothing but the naked legal title remaining in it, and the settler would have the right to have the title conveyed and vested in him.

Congress may deal with public lands in any manner that it sees fit. In the case of the *United States v. The Midwest Oil Company et al.*, 59 L. Ed. 309, the Supreme Court in the opinion said:

“Congress may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale. *Canfield v. United States*, 167 U. S. 524, 42 L. Ed. 262, 17 Sup. Ct. Rep. 864; *Light v. United States*, 220 U. S. 536, 55 L. Ed. 574, 31 Sup. Ct. Rep. 485. Like any other owner, it may provide when, how and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights.”

In the case of *Hall v. Russell*, *supra*, the court said:

“Congress had the right on assuming undisputed dominion over the territory to confine its bounties to settlers under just such limits as it chose.”

This right is clearly pointed out in the case of *Cooper v. Sioux City and Pacific R. R. Co.*, in a de-

cision handed down by Secretary Teller, Vol. 1, Land Decisions, 349. The secretary in the opinion said:

“The statute expressly prescribes that the minimum price (\$1.25) per acre for such land, so settled upon and pre-empted, shall be paid to the company. No authority is delegated to the register and receiver to receive such purchase money or to issue certificates therefor; no machinery is provided by the statute. If such delegation were attempted by this department it would be manifestly without sanction of law. The lands having been granted as aforesaid to the company, belong to the same; and hence, all tenders of purchase money should be made directly to it and would-be pre-emptors of such lands must look to the company and not to the government for title. And, if this be so, it may be assumed that, in case the lands be not otherwise disposed of, a party having settled and improved the land in such manner as would accept a pre-emption right to lands of the United States, may tender purchase money to the company and demand his deed; and if the same be refused, that he may maintain an action in equity to compel its execution; but in all this there is no room for further intervention by the Land Department.”

Authority for the right of the settler to maintain an action of this character is found in the case of *Platt v. Union Pacific* (99 U. S. 48, 25 L. Ed. 424). In the *Union Pacific* grant a provision almost identical with the provision of the act of March 3, 1871, was incorporated. Three years after the completion of its road the plaintiff, Platt, settled upon a quarter section of

land in the state of Nebraska, included within this grant. The Union Pacific instituted an ejectment suit against Platt for the possession of said land. Platt brought an action to enjoin the company from further prosecuting this action of ejectment against him. There was no question raised as to the right of the plaintiff Platt to maintain said action. It was tried through the United States Circuit Court of the District of Nebraska, and appealed to the Supreme Court of the United States, where a final judgment was entered. Platt was unsuccessful in his suit, but not on the ground that he did not have a right to maintain an action, but the case went out on another proposition.

The following cases also support this proposition:

U. S. v. Mo. etc. Ry., 141 U. S. 378, 35 L. Ed. 766;

Lynch v. Okla., 13 Okla. 147;

San Pedro Tin Co. v. U. S., 146 U. S. 132, 36 L. Ed. 911;

San Jacinto Tin Co. v. U. S., 125 U. S. 285, 31 L. Ed. 747;

N. P. Rd. Co. v. Trodrick, 221 U. S. 208, 55 L. Ed. 704;

Barden v. N. P. Ry. Co., 154 U. S. 288, 38 L. Ed. 992.

Counsel for the defendants contend that this is not such a contract or law as the courts will or can enforce, because it is incomplete. It is unnecessary that a contract be complete and that the minds of the parties have met on every part of it in order that it may

be enforceable in a court of equity. Where the contract is that the land shall be reconveyed, not at a price to be agreed upon by the parties, but at a fair price or at a fair valuation, the court will direct the valuation to be made and will enforce the performance of the contract, and when the parties have defined and agreed upon a plan by which the value may be ascertained, the courts will compel specific performance.

Pomeroy on Specific Performance on Contracts,
sections 151 and 158.

In section 151 he says:

“The second class embraces those contracts in which a mode for ascertaining the price is mentioned, but from the language of the stipulation it is regarded as non-essential, and as something rather by way of suggestion, so that the agreement itself is virtually one to sell for a fair price. In such a case, if the means specified for fixing upon the price fail, for any reason, the court does not treat the contract as fatally defective, but will, in the suit for a specific performance, direct a fair and reasonable price to be ascertained in some manner preliminary to the decree, either by referring the matter to a master or other officer, or by appointing a skilled person as a special valuer, or even by determining the amount itself. It will pursue any such mode as the circumstances of the case show to be expedient.

* * * * *

“The court will always look at the substance of the agreement, and disregard the mere forms which had been provided for effectuating it, and which cannot be made operative.”

In section 158 he speaks as follows:

“Under these circumstances, if, through neglect of the defendant or from any other cause other than the plaintiff’s own default, the provisions have not been carried into effect, the court will, as a preliminary to its decree, and as a step in the cause, provide a substituted method for accomplishing the object of the provision and completing the agreement.”

To the same effect see:

Van Doren v. Robinson, 16 N. J. Eq. 260;

Duffy v. Kelley, 55 N. J. Eq. 627;

U. S. Security & Bond Co. v. Riddle, 18 Colo. App. 107;

Fry on Specific Performance, 5th Ed., Sec. 353
et seq.;

Baker v. Metropolitan Ry. Co., 31 Beavens R. Eng. 504.

The language of this grant is that the land not sold or otherwise disposed of within three years after the completion of the entire road shall be subject to settlement and pre-emption the same as other lands, at a price to be *fixed* by and paid to the said company, and at an average of two dollars and fifty cents per acre, the manner of fixing the price per acre and the maximum amount it could obtain as a consideration for said lands in the aggregate. It gave the company the privilege of apportioning this price according to its best judgment of the relative value of the lands, but in the aggregate this price should not average more than two dollars and fifty cents per acre. There is

nothing uncertain or indefinite or incomplete about this law or contract.

The company knew just what it was getting when it accepted the grant and the law. It is such a contract and law as the courts can and will enforce. The company cannot avoid its force and effect by refusing to make a price on the land and offering it for sale as it agreed to when it accepted the grant, and when it fails and refuses to comply with these provisions the court will enforce it at the instance of the parties for whose benefit it was made.

In the Oregon case, *supra*, the interveners in that case were in the same position as the appellant in this case places himself as a prospective settler. The contention of the interveners in the Oregon case was that the provisos of the acts of April 10, 1869, and May 4, 1870, created a trust for those who might desire to acquire title thereto. The question as to the character of the railroad company's estate being one of conditional limitation, it was not presented nor passed upon by the court in the Oregon case.

We contend that that is wherein the distinction is in the rights created under the provisos that were involved in the Oregon case and the proviso of the acts involved in this action. The Supreme Court, upon the theory that was presented to it on behalf of the interveners in the Oregon case, decided that upon the express words of the proviso the word "actual" expressing a settlement completed, and could not be construed to include "contemplated or possible." The

court in that opinion, page 922, in discussing and disposing of the contentions of the interveners, said:

“The interveners concur with the cross-complainants that the acts created a trust, but assert that they have a broader extent. In other words, and as their counsel express it, the intention of Congress was to create a trust in the granted lands for the benefit of those who might desire to acquire title thereto; that is, not actual settlement was the condition of purchase, but an intention to settle, with the qualification to do so. Here, then, is a conflict between the asserted beneficiaries of the asserted trust—whether *actual settlers*, as cross-complainants contend, or *applicants* for settlement, as the interveners insist. The distinction would seem to be real and cannot be confounded. The word ‘actual’ expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos it would seem that interveners’ claims to be beneficiaries of the trust, if there is a trust, must be refuted.”

This quotation from that case sets out clearly and distinctly the question that was presented to the court on behalf of the interveners in that case and the question passed upon by the court and the reason for holding as it did. The conditions of the act of March 3, 1871, are quite different from those involved in the Oregon case, and, we contend, give rights to prospective purchasers that were not and could not have been contemplated or included in those provisos.

These motions to dismiss are in effect demurrers,

and in form they are general demurrers. The court sustained these demurrers and denied the appellant the right to amend his amended bill. The motions of the defendants to dismiss were submitted to the trial court upon the theory that the propositions of law involved were sufficiently pleaded to raise these questions.

It is the earnest desire of the appellant that the court pass upon the crucial propositions herein presented by the defendants' motions to dismiss and construe the acts of Congress involved herein and thereby determine the status and rights of the parties to this action.

If the court is of the opinion that the complaint or bill is not sufficient in any allegations in which it could be amended, then that such questions be disregarded by it and the complainant given leave and directed to make the necessary amendments at once. If the facts are not sufficiently pleaded in the complainant's amended bill, then the trial court has committed reversible error in denying the complainant the right to amend his bill, and this court should either permit the amendment to be made at this time or reverse the judgment on the ground that the trial court committed reversible error in not allowing the appellant to amend his bill.

We think this proposition needs no argument or citation of authorities to satisfy this court that our position in this particular is well taken. The motions to dismiss being in form a general demurrer, if a bill ever so crudely and indefinitely states facts sufficient to present the legal questions that were presented to the court

in this bill, and are urged in this court, are pertinent and are questions for this court to consider, pass upon and determine. The fact that it was tried in the trial court is sufficient for this purpose, and if the case has been submitted to the trial court and passed upon by it as being sufficient, it seems to us settles the sufficiency of the allegations in that particular.

These questions have been raised by numbers 72 and 73 of the assignment of errors. [Record, p. 36.]

We believe that the reasons we have given, asking for the construction that we contend for of these acts, are well founded and that they have the support of the court of last resort of this country. We believe that the contention of the defendants in support of their motion to dismiss is not well taken, and that the motion should have been overruled, and that the court should, in overruling said motion, have determined that the defendants are bound by all of the provisions and conditions of the act of March 3, 1871, and that all the lands granted in said act to the defendants which had not been sold or otherwise disposed of within three years after the completion of their entire road, could be sold only to persons who were eligible to make settlement or pre-emption upon public lands, at an average price of not to exceed two dollars and fifty cents per acre. That the defendants, having failed to apportion this price up to this time, and having denied that they were bound by the terms of said law, that they should be held to have waived their rights to apportion the price and that they should be compelled

to convey their interests in said lands to any persons eligible, upon the payment to them of the maximum price fixed in said law, of two dollars and fifty cents per acre.

It is therefore respectfully submitted that the decree of the court below must and should be reversed.

J. MACK LOVE,

Solicitor and Attorney for Complainant and Appellant.

NO. 2638.

**In the United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

October Term, 1915.

GEORGE S. FULLINWIDER,
Complainant and Appellant,
VS.

THE SOUTHERN PACIFIC RAILROAD
COMPANY OF CALIFORNIA, et al.,
Defendants and Appellees.

BRIEF FOR DEFENDANTS AND APPELLEES

CHAS. R. LEWERS and
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and Appellees.*

GUY V. SHOUP,
Of Counsel.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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No. 2638.

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THE SOUTHERN PACIFIC RAILROAD
COMPANY OF CALIFORNIA, et al.,
Defendants and Appellees.

BRIEF FOR DEFENDANTS AND APPELLEES

STATEMENT OF THE CASE.

This is an action to compel the conveyance to Complainant of a half section of land situated within the limits of the Congressional grant made to the Southern Pacific Railroad Company by the Act of March 3, 1871, (16 Stat. L. 573). The land in question is not withi the limits of the grant made to the Texas & tained in the same act. The complaint alleges that a tender at the rate of \$2.50 an acre was made to the defendant with a demand for a conveyance of the

land in question but that this conveyance was refused. The Complainant relies upon that portion of Section 9 of the Act of March 3, 1871, which reads as follows:

“And provided further that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of \$2.50 per acre for all lands herein granted.”

The defendants moved the Court to dismiss the action upon the ground, among others, that the bill of complaint did not state facts sufficient to constitute a cause of action in equity, or otherwise, or at all. This motion was granted, without leave to amend, and a decree was entered finally dismissing the bill. The Complainant has appealed to this Court from the decree of dismissal.

POINTS AND AUTHORITIES.

I.

IF THE PROVISION IN SECTION 9 ABOVE QUOTED SUBJECTING THE LANDS TO SETTLEMENT AND PRE-EMPTION AT A PRICE TO BE FIXED BY AND PAID TO THE RAILROAD COMPANY NOT EXCEEDING AN AVERAGE OF \$2.50 PER ACRE WAS APPLICABLE TO THE GRANT MADE TO THE SOUTHERN PACIFIC RAILROAD COMPANY, COMPLAINANT WOULD NOT BE ENTITLED TO ANY RELIEF.

This provision of the statute does not constitute any contract between the Railroad Company and Complainant which could be enforced by a suit for specific performance. The Railroad Company does not hold the land in trust for Complainant. There is no contract because no offer has ever been made by the Railroad Company, either of its own volition or through the act of Congress making the grant, of which the Complainant is entitled to take advantage. There is no trust because no specific beneficiary is named and the language used does not indicate an intention to create a trust in favor of anyone. There is nothing in the statute which requires the Railroad Company to sell within any particular period, or to sell one acre, or a thousand acres.

U. S. v. O. & C. Ry. Co., 186 Fed. 861;

O. & C. Ry. Co v. U. S., 59 L. Ed. 917.

This point does not, however, have any relevancy if we are correct in our contention that the provision in Section 9 of the act subjecting the lands to settlement and pre-emption at a price not exceeding an average of \$2. 50 per acre is not applicable to the grant made by the same act to the Southern Pacific Railroad Company.

II.

THE PROVISION IN SECTION 9 ABOVE QUOTED SUBJECTING THE LANDS TO SETTLEMENT AND PRE-EMPTION AT A PRICE FIXED BY AND PAID TO THE RAILROAD COMPANY NOT EXCEEDING AN AVERAGE OF \$2.50 PER ACRE IS NOT APPLICABLE TO THE GRANT MADE TO THE SOUTHERN PACIFIC RAILROAD COMPANY AS THE GRANT TO THE LATTER COMPANY WAS "WITH THE SAME RIGHTS, GRANTS AND PRIVILEGES AND SUBJECT TO THE SAME LIMITATIONS, RESTRICTIONS AND CONDITIONS AS WERE GRANTED TO SAID SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA BY THE ACT OF JULY 27, 1866." THE GRANT OF JULY 27, 1866 CONTAINS NO PROVISION WITH REFERENCE TO THE SALE OR THE SETTLEMENT OR PRE-EMPTION OF LANDS GRANTED TO THE COMPANY.

The act of March 3, 1871, above referred to purports to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its railroad the United States government, by act of Congress, empowered the Texas & Pacific Railroad Company to construct a railway and telegraph line on the easterly line of Texas, through El Paso and Yuma, to Ship's Channel in the Bay of San Diego in this State. By Section 9 of that act there was granted to the Texas & Pacific Railroad Company every alternate section of public land, not mineral, to the amount of twenty alternate sections per mile on each side of its railroad line through the territories of the United States and ten alternate sections in California. Section 9 of the act contained the provision

above quoted, stating that the lands therein granted should be subject to settlement and pre-emption like other lands at a price to be fixed by and paid to the company not exceeding an average of \$2.50 per acre for all the lands therein granted. In subsequent sections of the act provision was made for the filing of a map of the route and designation thereby of the lands which should vest in the railroad company under the above-mentioned provision.

The Southern Pacific Railroad Company is not mentioned, however, until Section 23 of the act is reached. This section is as follows:

“That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seventh, eighteen hundred sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company.”

It will be noticed that the grant to the Southern Pacific Railroad Company is not upon the same terms or conditions or with the same rights and privileges as the grant to the Texas Pacific. The grant to the

Southern Pacific Railroad Company is “with the *same* rights, grants and privileges and subject to the *same* limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seventh, eighteen hundred sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company.”

Turning to the act of July 27, 1866 (14 Stats. 292, c. 278) we find an act of Congress providing for the construction, and granting lands in aid thereof, of a railroad to be built from Springfield, Missouri to the Pacific Ocean by the Atlantic & Pacific Railroad Company. By Section 3 thereof there was granted to the railroad company twenty alternate sections of land per mile on each side of the right of way through the territories and ten alternate sections on each side of the right of way in the states through which it passed, mineral lands excepted. There was, however, no provision in the act similar to that in Section 9 of the grant to the Texas Pacific with reference to settlement and pre-emption of the lands granted to the railroad company. In other words, the railroad company was left free to dispose of its lands upon such terms and conditions as it might deem best. Section 18 of this act of July 27, 1866 authorized the Southern Pacific Railroad Company to connect with the Atlantic & Pacific Railroad Company at such point near the boundary line of California as it should deem most suitable for a railroad line to San Fran-

cisco and in consideration thereof, to aid in its construction, it was further provided that the said Southern Pacific Railroad "shall have similar grants of land subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations as to time and manner with the Atlantic & Pacific Railroad herein provided for."

It would, therefore, seem obvious that, so far as the Southern Pacific Railroad Company is concerned, it was the intention of Congress that the lands granted to it by the act of March 3, 1871, were to be accompanied with the same rights, grants and privileges and subject to the same limitations, restrictions and conditions as were granted to the Southern Pacific Railroad Company by the act of July 27, 1866. In fact, the act so provides specifically. It is not conceivable how language could be made more explicit in this respect than the language contained in the act of March 3, 1871. Yet we find counsel apparently seriously contending that the act does not mean what it says, but that it must be so construed as to make the grant to the Southern Pacific Railroad Company under Section 23 of the act of March 3, 1871 subject to the provision in Section 9 of the grant to the Texas and Pacific subjecting the lands to settlement and pre-emption at a price not exceeding an average of \$2.50 per acre. In other words, the Southern Pacific Railroad Company was not to receive its land grant with the same rights, grants and privileges as were contained in the grant of July 27, 1866, but was

to have the limitations, restrictions and conditions imposed upon the Texas Pacific by the provision in Section 9 also imposed upon the Southern Pacific grant. Section 9 of the act of March 3, 1871 does not contain any grant to the Southern Pacific. The grant therein provided for is a grant to the Texas Pacific Railroad Company, its successors and assigns. The Southern Pacific Railroad Company is not mentioned nor is any grant made to it until Section 23 is reached. This section is the last section in the statute. It contains a grant to the Southern Pacific Railroad Company. It prescribes its rights, grants and privileges, and limitations, restrictions and conditions in accordance with the previous grant of July 27, 1866. That grant alone is made the measure of the Southern Pacific Railroad Company's rights and privileges and its limitations, restrictions and conditions. The act of March 3, 1871 involved two separate grants, one to the Texas and Pacific upon the terms and conditions prescribed in that act, the other to the Southern Pacific Railroad Company with the rights and privileges and upon the terms and conditions prescribed in another act.

This suit is a companion suit to the case of *Burke v. Southern Pacific Railroad Company* involving the same contentions, decided April 2nd, 1915, by Judge Bledsoe for the United States District Court, Southern District of California. (222 Fed. 97.) There is nothing that we could add to the reasoning of Judge Bledsoe's opinion which clearly and convincingly disposes of the points made by the plaintiff in that

case, and we are content to rest this case upon Judge Bledsoe's opinion in the Burke case with only such additional comments as may seem desirable in view of the fact that appellant's counsel in the present case has framed his argument along somewhat different lines than those advanced in the Burke case, although the conclusion sought to be established in both cases is the same, that is, that the Southern Pacific Railroad Company is bound by the provisions of Section 9 of the act of March 3, 1871 as well as the Texas and Pacific.

In order to reach this conclusion appellant's counsel has discussed from his point of view the history of the land laws of the United States, the development of the policies of Congress in regard to public domain and donations of public lands to railroads, the evils of unrestricted grants and the history of the act of March 3, 1871, all of which apparently is designed to establish his contention that at the time of the passage of the act of March 3, 1871 there was a growing sentiment against the granting of public lands to aid in the construction of railroads and that "the history of Congress shows that from March 3, 1869 up to the passage of this act of March 3, 1871, there wasn't a grant made or an old grant revived or extended that did not have attached to it a settlers' clause" and that "this had become the settled policy of Congress." With this premise established to his satisfaction, counsel further argues that "It would be absurd and ridiculous to place upon this act (March 3, 1871) a construction under these circum-

stances that placed Congress in the position of reversing the unquestioned established policy by adding the settlers' clause to all of these land grants and also adding it to the main purpose which induced the act of March 3, 1871, and giving, without any restrictions, limitations or conditions, a large grant to these defendants."

In connection with this argument counsel relies upon the doctrine of *in pari materia* as entitling him to construe the act of March 3, 1871 with certain other land grants to railroad companies. In order to avoid the embarrassment that would result from the fact that from the time of the first grant to the Illinois Central on September 20, 1850 to the Texas Pacific grant of March 3, 1871, no land grants to railroads contained any "settlers' clause" with the exception of the grant to the Oregon Central Railway Company by the act of May 4, 1870 and the Texas Pacific grant of March 3, 1871, appellant's counsel divides the history of grants of public lands in aid of railroads into three distinct periods and has assigned the grants to the Oregon Central Railway Company and the Texas and Pacific to the third and last period (Appellant's brief, page 37). Counsel then argues that, being entitled to construe the Texas and Pacific grant "with all other grant acts covering that period," that is, the period covering the grant to the Oregon Central Railway Company and the Texas and Pacific grant, and it appearing, according to counsel, that the grants to the Oregon Central and to the Texas and Pacific clearly define the policy of Con-

gress in favor of the insertion of the settlers' clauses in such grants, the doctrine of *in pari materia* will require the insertion of such a settlers' clause in the grant made to the Southern Pacific Railroad Company by Section 23 of the act of March 3, 1871 (Texas and Pacific grant). Stated in another way, counsel's contention is that so much of Section 23 of the act of March 23, 1871 as provides that the grant made by that act to the Southern Pacific Railroad Company shall carry the same rights, grants and privileges and be subject to the same limitations, restrictions and conditions as were granted by the act of July 27, 1866 shall be disregarded. The basis for this contention is that inasmuch as the grant to the Oregon Central Railway Company by the act of May 4, 1870 and the grant to the Texas and Pacific by the act of March 3, 1871 contained certain limitations and conditions in favor of settler Congress must have intended to insert such a clause in the grant to the Southern Pacific Railroad Company under Section 23 of the act of March 3, 1871. This conclusion can only be reached upon the theory that Congress did not mean what it said when it provided that the act of July 27, 1866 should be the measure of the Southern Pacific's rights, grants and privileges and limitations, restrictions and conditions, and carefully refrained from imposing any provision or condition as to the sale to actual settlers.

It is not deemed necessary to follow Appellant's counsel in his discussion of the history of the land laws and the evils of unrestricted grants, or the his-

tory of the bill of March 3, 1871, or to indulge in any extended discussion of the cases cited by him with reference to the doctrine of *in pari materia*. It is obvious, of course, that the act of July 27, 1866 must be referred to in order to ascertain the rights of the Southern Pacific Railroad Company under the grant made to it by Section 23 of the act of March 3, 1871. The policy of Congress as evidenced by any other grant it may have made to any other railroad company is not material or relevant in any degree. Its policy, so far as the grant to the Southern Pacific Railroad Company was concerned, is evidenced by clear and unmistakable language. While all acts granting lands to aid in the construction of railroads have necessarily certain provisions more or less in common, each of them contains, almost without exception, conditions and requirements that are applicable to that particular railroad alone. If counsel's contentions are correct and the conditions prescribed in every railroad land grant act should be deemed applicable to every other railroad land grant act, regardless of the provisions of that act, hopeless confusion and uncertainty would result. The subject-matter in each act, however, is entirely different and each statute must be governed by its own provisions, and where Congress has, as in the present case, specifically said that the provisions of a certain statute shall govern it is impossible to believe that Congress meant that the provisions of another act, which are quite inconsistent with the statute to which specific reference is made, must also be deemed included. Not only must the statute relate to the same subject

(Lewis Sutherland Stat. Cons. 2nd Ed., Vol.2, Sec. 443), but it is not *in pari materia* "though it may incidentally refer to the same subject if its scope and aim are distinct and unconnected." (Id. Sec. 449). Moreover, "While it is thus true that statutes relating to the same subject are to be construed together, this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous statutes, where such language requires such policy to be disregarded. Where the last statute is complete in itself, and intended to prescribe the only rule to be observed, it will not be modified by the displaced legislation, as laws *in pari materia* (Id. Sec. 447). As stated in Vol. 36 Cyc. 1150:

"It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it cannot be invoked where the language of a statute is clear and unambiguous."

Congress could, of course, have imposed other conditions or limitations upon the Southern Pacific Railroad Company by the act of March 3, 1871, if it desired to do so. It may be that it refrained from imposing upon the grant to the Southern Pacific the restriction with reference to the sale to settlers that was imposed upon the grant to the Texas Pacific because the grant to the Southern Pacific was merely, in effect, the grant of a branch line to its main line grant of July 27, 1866, and it was deemed more desirable and consistent to have its branch line grant have

the same rights, conditions and requirements as its main line grant than to require its construction under other and different conditions. Possibly, also, Congress was influenced by the fact that the branch line grant given to the Southern Pacific by the act of March 3, 1871 came in substantial conflict with a prior grant to the Atlantic & Pacific. This not only materially lessened the value of the grant to the Southern Pacific, but it rendered its title to all the land within the conflicting limits of the two grants uncertain and the inadvisability of inserting any provision which might induce settlers to believe they could secure a good title through the Southern Pacific by virtue of this grant was apparent. In fact, the Southern Pacific lost title to all the lands, both primary and indemnity, within the conflicting limits of the two grants although the Southern Pacific constructed its railroad and the Atlantic & Pacific did not *U. S. v. S. P. R. R. Co.*, 146 U. S. 570; *U. S. v. Colton M. & S. Co.*, 146 U. S. 615).

It is not material, however, what the reasons were that actuated Congress in making the grant, or in determining what restrictions or limitations should accompany it. "It is a well settled rule that so long as the language is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the Court to give it force and effect" (36 Cyc. 1115). The language of the statute is plain and unequivocal. As was said by Judge Bledsoe in the Burke case (222 Fed. 103):

“I can come to no other conclusion than that the intention of Congress was, as gathered from its apt, expressive, unequivocal, and unambiguous language, that the Southern Pacific Railroad Company should receive a grant of land along both sides of the road to be constructed from Mojave, through Los Angeles, to Yuma, of the same general nature, and subject only to the same conditions and limitations as specified in the grant to the same road for the similar purpose of constructing its line from Mojave to Needles; that there is nothing from which it could be rationally deduced or inferred that Congress intended that the grant to the Southern Pacific was to be clogged with the condition imposed upon the grant to the Texas Pacific; and that for this Court so to declare would be for it to usurp the legislative functions of the government and to set at naught the plainest principles of statutory interpretation and constitutional justice.”

It may be observed in conclusion that, as stated in the opinion of Judge Bledsoe in the *Burke* case, *supra*, the Supreme Court of the United States in litigation involving this grant “followed the obviously natural construction adopted hereinabove” and held “that the grant to the Southern Pacific was ‘with the same rights, grants, and privileges, and subject to the same limitations,’ etc., as in the act of July 27, 1866 (189 U. S. 449, 23 Sup. Ct. 568, 47 L. Ed. 896). So, also, on page 450, of 189 U. S., on page 568 of 23 Sup. Ct., 47 L. Ed. 896, the Court said: ‘The Texas Pacific act refers to the act of July 27, 1866, for the rights conferred on the Southern Pacific.’”

While this case is of but little importance in itself, it is one of nearly five hundred similar claims upon which suits have been filed, with several hundred new ones in preparation, all of which have been fostered by Mr. Burke and his associates whose chief interest therein apparently is certain fees which they expect to secure from those whom they may induce to advance money in promoting litigation of this character. (*Burke v. S. P. R. R. Co.*, 222 Fed. 97.)

A great deal of the land involved is already under contract of sale by the Southern Pacific Railroad Company to purchasers whose title is of course clouded by suits of this character. Moreover, it is important that those who are being led to expend money at the instance of Mr. Burke and his associates in cases of this kind should be disabused of any erroneous impressions that may have been created in their minds as to their ability to maintain such cases.

It is to be regretted that this Court's time must be taken up with cases of this character. The fact, however, that such cases may have no substantial foundation does not make them any the less annoying or injurious to the rights of others.

It is respectfully submitted that the decree of the Court below should be affirmed.

CHAS. R. LEWERS and

W. I. GILBERT,

*Attorneys for the Southern Pacific Railroad
Company of California, The Southern Pacific
Railroad Company, The Southern Pacific
 Company, The Southern Pacific Land Com-
 pany, The Imperial Valley Farm Lands As-
 sociation, The Central Trust Company and
 The Equitable Trust Company.*

LUTHER G. BROWN,

*Attorney for the California Land & Water
 Company.*

GUY V. SHOUP,

Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. C. STRONG,

Appellant,

VS.

C. A. HOLMES,

Appellee.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

Apostles on Appeal.

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

United States
Circuit Court of Appeals

For the Ninth Circuit.

H. C. STRONG,

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INDEX TO THE PRINTED APOSTLES ON APPEAL.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors.....	12
Attorneys of Record, Names and Addresses of..	1
Bond on Appeal.....	13
Certificate of Clerk U. S. District Court to Apostles on Appeal.....	19
Citation on Appeal (Original).....	16
Decree of Dismissal.....	9
Memorandum Opinion	8
Names and Addresses of Attorneys of Record...	1
Notice of Appeal.....	10
Opinion	8
Order Allowing Appeal and Fixing Amount of Bond	11
Order Directing that Notice be Given by Peti- tioner Re Limitation of Liability, etc.....	7
Petition and Libel.....	1
Praeceptum for Apostles on Appeal.....	18

[Names and Addresses of Attorneys of Record.]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

IN ADMIRALTY—No. 1214—A.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

Messrs. SHACKLEFORD and BAYLESS, Juneau,
Alaska,

Messrs. BRONSON, ROBINSON and JONES,
Seattle, Washington.

Proctors for Libelant and Petitioner.

V. A. PAINE, Juneau, Alaska,

Proctor for Claimant C. A. HOLMES.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

IN ADMIRALTY—No. 1214—A.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

Petition and Libel.

To the Honorable Judge of the Above-entitled Court:

Comes now H. C. Strong, and in pursuance of the
laws and Statutes of the United States presents this,
his petition and libel, in a proceeding to limit his
liability in respect to certain claims made against
him as the owner of the Steamship “Alki,” and
herewith alleges as follows:

I.

That during all of the year 1912, the legal title to the said steamship "Alki" stood in the name of your libelant and petitioner. That your petition is and was at all times herein mentioned a citizen of
J. T. R. the United States and a resident of Ketchi-
D. C. kan, Alaska.
6-26-15

II.

That on, to wit, the 26th day of March, 1912, the said steamship "Alki" left Seattle, Washington, on a voyage to Juneau, Alaska, which said voyage was completed on April 3d, 1912.

III.

That during the said voyage at Ketchikan, Alaska, on, to wit, the 31st day of March, 1912, some piles of lumber in the 'tween decks of said steamship toppled over.

IV.

That the falling of said lumber was not due to any negligence of your libelant and petitioner and was not occasioned by any cause whatever within his privity or knowledge.

V.

That notwithstanding these facts claims for damage have been made against your libelant and petitioner as the result of the [1*] said fall of lumber; and other claims may be still made; that one C. A. Holmes in particular has made a claim in the sum of twenty-one thousand two hundred and fifty dollars; and has in the Superior Court of King

*Page-number appearing at foot of page of certified Apostles on Appeal.

county, State of Washington, secured a judgment on said claim; and in the further prosecution of said claim has secured a judgment in this court sitting at Juneau, Alaska, upon the said judgment so rendered in the State of Washington, the judgment in Alaska J. T. R. having been entered on the 27th day of D. C. October, 1914, in cause Numbered 1130-A; 6-26-15 said cause being entitled, C. A. Holmes vs. H. G. Strong; and your petitioner further alleges that the said C. A. Holmes and his attorneys are threatening to issue immediate execution upon the said Alaska judgment.

VI.

That your libelant and petitioner claims entire exemption from the said claim; and in the alternative alleges that in any event he is not liable in excess of the amount or value of his real and beneficial interest in the said steamship "Alki," which interest he alleges to have been, on, to wit, March 31, 1912, merely nominal and far less than the amount of the said claim of the said C. A. Holmes.

VII.

That so far as your libelant and petitioner knows there are no lienable claims against the said steamship "Alki" as the result of said voyage, unless the claim of C. A. Holmes may be held to be such. That the address of said C. A. Holmes as far as it is known to your petitioner, is Seattle, Washington, and that his attorneys are Chauncey Baxter and C. Will Jones, 805 White Building, Seattle, Washington.

WHEREFORE, by reason of the matters and things hereinbefore set forth, and by virtue of Sec-

tions 4283, 4285, and 4289, of the Revised Statutes of the United States; and by virtue of the rules, laws and regulations of the United States applicable to the premises, your libelant and petitioner herewith offers to enter into stipulation for the value of his interest in the said "Alki" and her freight pending on said [2] voyage, when the amount of the said interest shall have been determined by appraisal according to the order of the Court, and to file said stipulation for value in the above-entitled cause and court to await the disposition of any and all claims that may be filed;

AND YOUR PETITIONER PRAYS that this Court will forthwith enter a temporary injunction forbidding the said C. A. Holmes, or his attorneys, from issuing execution or taking any steps to collect the said judgment entered in cause number 1130-A in this court on the said 27th day of October, 1914; and that this Court will order a commissioner of the United States or some other competent person or commissioner to make an appraisal of the interest of your petitioner in the said steamship "Alki" on the said 31st of March, 1912, at an appropriate time and place and will cause notice of said appraisal to be given to the said C. A. Holmes, or to Chauncey Baxter and C. Will Jones, his attorneys, at 805 White Building, Seattle, Washington;

AND YOUR PETITIONER FURTHER PRAYS That when said appraisal has been had, the Court will order your petitioner to enter into a stipulation for the said appraised value and to file the same in this court; and that thereupon this Court will con-

tinue the said temporary injunction against the said C. A. Holmes and will issue a further temporary injunction against all persons forbidding the bringing of new suits in the premises; and your petitioner further prays the Court to thereupon order the United States Commissioner of this District to receive proof of claims in the premises, and will cause a monition to be issued to all persons whomsoever claiming damages as the result of said fall of lumber, to appear before the Commissioner at or before a time therein named, to file their claims and answer under oath the allegations of this petition, if answer they have; upon the return of said commissioner your petitioner further prays this Honorable [3] Court to make a final decree exempting this petitioner from all liability, or limit his liability as the facts found by the commissioner and the law pertaining thereto may warrant; and therewith to issue a perpetual injunction enjoining all persons from prosecuting any action whatsoever in any court or courts whatsoever to recover upon any claims as the result of the said fall of the lumber hereinbefore referred to.

SHACKLEFORD & BAYLESS,
CHARLES E. INGERSOLL,

Proctors for Libelant and Petitioner.

United States of America,
District of Alaska,—ss.

H. C. Strong, being first duly sworn, on oath deposes and says: That he is the libelant and petitioner in the above-entitled proceedings; that he has read the foregoing petition and libel and that the matters

and things as therein stated are true, except as to such matters as are stated upon information and belief; and that as to those matters, he believes them to be true.

H. C. STRONG.

Subscribed and sworn to before me this 11th day of January, 1915.

[Notarial Seal]

W. S. BAYLESS,

Notary Public in and for the Territory of Alaska,
Residing at Juneau.

My commission expires Dec. 22, 1917.

Filed in the District Court, District of Alaska,
First Division. Jan. 25, 1915. J. W. Bell, Clerk.
By —————, Deputy. [4]

[Endorsements]: No. 1214-A. In the District Court for the District of Alaska, Division No. 1. In the Matter of the Petition of H. C. Strong to Limit His Liability for Certain Claims Made Against Him as Owner of the Steamship "Alki." In Admiralty. Shackleford & Bayless, Juneau, Alaska. [5]

*In the United States District Court, for the District
of Alaska, Division Number One, at Juneau.*

No. 1214-A.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

**Order [Directing That Notice be Given by Petitioner
re Limitation of Liability, etc.]**

This matter came on to be heard on the *ex parte* application of petitioner, petitioner being represented by W. S. Bayless, Esq. The Court being in doubt both as to its jurisdiction in the premises and as to the sufficiency of the allegations and the propriety of granting the relief asked for, and it being unwilling to decide said questions except upon a full presentation of the matter and an opportunity given to the claimant mentioned in said petition, to wit, C. A. Holmes, does now adjourn the hearing of the matters contained in the petition until Monday, the first day of March, 1915, at 10 o'clock A. M., and does direct that notice be given by the petitioner, to the said C. A. Holmes, or to his attorney in the action of C. A. Holmes vs. H. C. Strong (being No. 1130-A of the files of this court), that on said date and at the courthouse in Juneau, the said petition will be brought on for argument, both as to the jurisdiction of the Court, the sufficiency of the allegations of the petition, and the propriety of granting the relief asked for, at which said time and place, he, the said

C. A. Holmes, or his attorney, may appear and present such argument and authorities in opposition to the prayer of said petitioner as to him may seem desirable. [6] A copy of said petition shall be served with said notice.

Done in open court this 25th day of January, 1915.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. K, page 136.

Filed in the District Court, District of Alaska, First Division. Jan. 27, 1915. J. W. Bell, Clerk.
By —————, Deputy.

[Endorsements]: No. 1130-A. In the United States District Court for the District of Alaska, Division No. One. C. A. Holmes, Plaintiff, vs. H. C. Strong, Defendant. Order. [7]

[Opinion.]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

IN ADMIRALTY—No. 1214-A.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

Paragraph I of the petition having been amended by adding the following words: “That your petitioner is and was at all times herein mentioned a citizen of the United States and a resident of Ketchikan, Alaska”; and paragraph V of the petition having been so amended that it shows that the judg-

ment recovered in this jurisdiction was a judgment on a judgment of the State of Washington, and the matter having been resubmitted to the Court for determination as to whether or not the Court can or should entertain jurisdiction hereof, the Court is of opinion that the petition as amended as aforesaid shows that this Court has no jurisdiction to entertain the same and that the proceedings should be brought in the jurisdiction where the Washington judgment was recovered.

The Alpina, 8 Fed. 285.

Judge Blodgett says—

“but the Court only intended to say that if the owner delayed such proceedings until a suit had been commenced, then he should commence such proceeding in the District Court where such suit was commenced.”

I am of opinion, therefore, that this Court cannot and ought not to exercise jurisdiction in the premises. Accordingly the petition is dismissed. Petitioner allowed 30 days in which to file Bill of Exceptions.

ROBERT W. JENNINGS,

Judge. [8]

Filed in the District Court, District of Alaska, First Division. Jul. 29, 1915. J. W. Bell, Clerk. By ———, Deputy.

[Endorsements]: In Admiralty—No. 1214-A. In the United States District Court for the District of Alaska, Division No. One. In the Matter of the Petition of H. C. Strong to Limit His Liability for

Certain Claims Made Against Him as Owner of the
Steamship "Alki." Memorandum Opinion. [9]

*In the United States District Court, for the District
of Alaska, Division Number One, at Juneau.*

No. 1214-A.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
"ALKI."

Notice of Appeal.

To C. A. Holmes, Claimant, and to Chauncey Baxter
and V. A. Paine, His Proctors:

You, and each of you, will please take notice that
H. C. Strong, the libelant and petitioner herein,
hereby appeals to the United States Circuit Court of
Appeals for the Ninth Circuit, from the Decree of
Dismissal entered herein on or about the 29th day of
July, 1915, and from each and every part thereof.

Dated this 27th day of August, A. D. 1915.

SHACKLEFORD & BAYLESS,

Juneau, Alaska.

BRONSON, ROBINSON & JONES,

Seattle, Washington,

Proctors for Petitioner and Libelant.

Service of the within notice of appeal, and receipt
of copy thereof admitted this 27th day of August,
1915.

V. A. PAINE,

Proctor for Claimant.

Filed in the District Court, District of Alaska,
First Division. Aug. 27, 1915. J. W. Bell, Clerk.
By ———, Deputy. [10]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1214-A.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

**Order Allowing Appeal [and Fixing Amount of
Bond].**

On motion of Messrs. Shackelford & Bayless, proc-
tors for the libelant and petitioner herein,

IT IS HEREBY ORDERED, That an appeal to
the United States Circuit Court of Appeals for the
Ninth Circuit from the decree and order of dismissal
heretofore made, rendered and entered herein be,
and the same is hereby, allowed.

IT IS FURTHER ORDERED, That the bond on
appeal herein be the sum of Five Hundred (\$500)
Dollars.

Done in open court this 27th day of August, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska,
First Division. Aug. 27, 1915. J. W. Bell, Clerk.
By ———, Deputy. [11]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1214-A.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

Assignment of Errors.

H. C. Strong, libelant and petitioner in the above-entitled court and cause, assigns the following Errors committed by the trial court in the rendition and entry, on July 29, 1915, of the order dismissing the Libel and Petition herein upon which he will rely in the Circuit Court of Appeals for the Ninth Circuit, to wit:

I.

The Court erred in entering an order herein on July 29, 1915, refusing to exercise jurisdiction in the premises and dismissing the petition of libelant and petitioner for limitation of his liability, on the ground that the District Court for the District of Alaska, Division No. One, at Juneau, was without jurisdiction to entertain said petition.

II.

The Court erred in sustaining the oral objections of the claimant, C. A. Holmes, entering an order dismissing the petition and refusing to examine the matter on the merits.

WHEREFORE, the libelant and petitioner, appellant herein, prays that the order of dismissal of the

trial Court be reversed and that said Court be directed to entertain said petition and deal with the same according to the rules and practices in [12] such cases provided.

SHACKLEFORD & BAYLESS,

Juneau, Alaska.

BRONSON, ROBINSON & JONES,

Seattle, Washington.

Proctors for Libelant and Petitioner.

Service of the within assignment of errors and receipt of copy of same admitted this 27th day of August, 1915.

V. A. PAINE,

Proctor for Claimant, C. A. HOLMES.

Filed in the District Court, District of Alaska, First Division. Aug. 27, 1915. J. W. Bell, Clerk.
By ———, Deputy. [13]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1214—A.

In the Matter of the Petition of H. C. STRONG
to Limit his Liability for Certain Claims
made Against Him as Owner of the Steam-
ship "ALKI."

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, the undersigned libelant H. C. Strong of
Ketchikan, Alaska, as principal and Henry Shat-
tuck and Allen Shattuck of Juneau, Alaska, as sure-
ties, are held and firmly bound unto the said claimant

C. A. Holmes, his heirs, executors, administrators and assigns in the full and just sum of Five Hundred (\$500) Dollars, to be paid to the said C. A. Holmes, his heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 27th day of August, 1915.

WHEREAS, Lately at a session of the District Court for the District of Alaska, Division Number One, at Juneau, the libelant and petitioner, H. C. Strong, filed a petition in said court to limit his liability for certain claims made against him as the owner of the steamship "Alki," and particularly the claim made by one C. A. Holmes, which claim had been reduced to judgment, both in the courts of the State of Washington and the Territory of Alaska, Division Number One; and

WHEREAS, The said Court has refused to take jurisdiction of the said petition of H. C. Strong to limit his liability, and has, on the 29th day of July, 1915, made and entered an order finally dismissing said petition and libel of the libelant and [14] awarding costs against him; and,

WHEREAS, the libelant and petitioner has filed a notice of appeal herein from said order dismissing the said libel and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, to be hereafter held in the City of San Francisco, State of California, to reverse the

final order of the Court made and entered herein on the 29th day of July, 1915; and.

WHEREAS, Said appeal has been by this Court allowed;

NOW, THEREFORE, The condition of the above obligation is such that if the said libelant and petitioner shall prosecute the said appeal to effect and shall answer all damages and costs that may be awarded against him if he fails to make good his plea, then this obligation is to be void; otherwise to remain in full force and effect.

H. C. STRONG,

By W. S. BAYLESS,

His Proctor of Record,

HENRY SHATTUCK. (Seal.)

ALLEN SHATTUCK. (Seal.)

United States of America,

Territory of Alaska,—ss.

Henry Shattuck and Allen Shattuck, being first duly sworn, each for himself and not one for the other, on oath deposes and says: That I am a resident and householder in the Territory of Alaska, and am worth the sum of One Thousand (\$1,000) Dollars over and above all legal liabilities and exclusive of property [15] exempt from execution.

HENRY SHATTUCK.

ALLEN SHATTUCK.

Subscribed and sworn to before me this 27th day of August, 1915.

[Notarial Seal.]

R. C. HURLEY,

Notary Public for Alaska.

My commission expires Nov. 15, 1916.

Sufficiency of the sureties of the foregoing bond approved this 27th day of August, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska,
First Division. Aug. 27, 1915. J. W. Bell, Clerk.
By ————— Deputy. [16]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1214—A.

In the Matter of the Petition of H. C. STRONG
to Limit his Liability for Certain Claims
made Against Him as Owner of the Steam-
ship "ALKI."

Citation [on Appeal (Original).]

To C. A. Holmes, Claimant, and V. A. Paine and
Chauncey L. Baxter, His Proctors:

WHEREAS, The petitioner and libelant, H. C. Strong, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree and order of dismissal herein lately rendered in the District Court for the District of Alaska, Division No. One, at Juneau, dismissing the petition and libel of the libelant and awarding costs against the petitioner, and on said appeal has failed the security as required by law;

NOW, THEREFORE, you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco and the State of

California, within thirty days from the date hereof, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the City of Juneau, in the Territory of Alaska, on the 27th day of August, 1915, and of the independence of the United States the one hundred thirty-ninth.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 27th [17] day of August, 1915, and of the independence of the United States of America one hundred thirty-ninth.

ROBERT W. JENNINGS,
District Judge Presiding in the District Court for
the District of Alaska, Division Number One, at
Juneau.

[Seal] Attest: J. W. BELL,
Clerk of the District Court for the District of Alaska,
Division Number One, at Juneau.

Service of the within Citation and receipt of a
copy admitted this 27th day of August, 1915.

V. A. PAINE,
Of Proctors for Claimant.

Filed in the District Court, District of Alaska,
First Division. Aug. 27, 1915. J. W. Bell, Clerk.
By ————— Deputy. [18]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1214—A.

In the Matter of the Petition of H. C. STRONG
to Limit his Liability for Certain Claims
made Against Him as Owner of the Steam-
ship "ALKI."

Praeipe for Apostles on Appeal.

To J. W. Bell, Clerk of the Above-entitled Court:

Please prepare for the apostles on appeal herein
the following:

1. Petition and Libel.
2. Order of Court dated January 25, 1915.
3. Memorandum Decision of Court Dismissing Pe-
tition and Libel as amended, dated July 29,
1915.
4. Notice of Appeal.
5. Order Allowing Appeal.
6. Assignment of Errors.
7. Bond on Appeal.
8. Citation.
9. Praeipe.

Yours truly,

SHACKLEFORD & BAYLESS,
BRONSON, ROBINSON & JONES,
Proctors for Libelant and Petitioner.

Filed in the District Court, District of Alaska,
First Division. Aug. 27, 1915. J. W. Bell, Clerk.
By ————— Deputy. [19]

**[Certificate of Clerk U. S. District Court to Apostles
on Appeal.]**

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

United States of America,
District of Alaska, Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached nineteen pages of typewritten matter, numbered from 1 to 19, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, prepared in accordance with the praeceps of proctors for libellant and petitioner, on file in my office and made a part hereof; in cause No. 1214-A, In the Matter of the Petition of H. C. Strong to limit his liability for certain claims made against him as owner of the steamship "Alki."

I further certify that the said record is by virtue of a Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this apostle was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Seven and 35/100 Dollars (\$7.35), has been paid to me by Messrs. Shackelford and Bayless, Proctors for Libellant and Petitioner.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled Court this 27th day of August, 1915.

[Seal]

J. W. BELL,
Clerk,

By _____,
Deputy.

[Endorsed]: No. 2648. United States Circuit Court of Appeals for the Ninth Circuit. H. C. Strong, Appellant, vs. C. A. Holmes, Appellee. In the Matter of the Petition of H. C. Strong to Limit His Liability for Certain Claims Made Against Him as Owner of the Steamship "Alki." Apostles on Appeal. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed September 4, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

15
No. 2648

United States
Circuit Court of Appeals

For the Ninth Circuit

H. C. STRONG,

Appellant,

vs.

C. A. HOLMES,

Appellee.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
"ALKI."

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ALASKA, DIVISION NO. 1.

BRIEF OF APPELLANT

BRONSON, ROBINSON & JONES,
Attorneys for Appellant.

614-619 Colman Bldg.,
Seattle, Washington.

United States
Circuit Court of Appeals

For the Ninth Circuit

H. C. STRONG,

Appellant,

vs.

C. A. HOLMES,

Appellee.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ALASKA, DIVISION NO. 1.

BRIEF OF APPELLANT

BRONSON, ROBINSON & JONES,
Attorneys for Appellant.

614-619 Colman Bldg.,
Seattle, Washington.

United States
Circuit Court of Appeals

For the Ninth Circuit

H. C. STRONG,

Appellant,

vs.

C. A. HOLMES,

Appellee.

In the Matter of the Petition of H. C. STRONG to
Limit His Liability for Certain Claims Made
Against Him as Owner of the Steamship
“ALKI.”

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ALASKA, DIVISION NO. 1.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This is an appeal from an order of the lower court refusing to entertain appellant's petition for limitation of liability on the ground that it was not filed in the proper district court. The allegations of the petition may be substantially set forth in narrative form as follows:

The appellant being at all times mentioned a resident of Ketchikan, Alaska, owned the Steamer "Alki" upon which the appellee was injured at Ketchikan, in 1912, by the falling over of some lumber in the hold. The appellee brought suit against the appellant in the Courts of the State of Washington, and secured a judgment, upon which judgment he subsequently secured a further judgment in the District Court at Juneau, Alaska, in cause No. 1130A. The appellant filing his petition ^{as permitted} to do by Admiralty Rule 56, to offer to enter into a stipulation for the appraised value of his interest in the vessel and her pending freight. He prayed that the collection of the Alaska judgment might be stayed until the petition might be heard; that all claimants and especially the appellee, might be cited to appear; that the court would adjudicate their claims, and having done so, would enjoin the prosecution of such claims or further claims in other courts. (Ap. 1-5).

Upon the presentation of the petition an order was entered fixing a day for hearing that the appellee might appear and object to the jurisdiction, or to the sufficiency of the petition. (Ap. 7). The appellee appeared and objected to the jurisdiction. The objection was sustained and the petition dismissed upon the ground that it could be entertained only by that District Court of the United States sitting within the State of Washington. (Ap. 8-9).

It will be noted that the order does not deny the jurisdiction of the Federal Courts as such, but asserts that the District Court of Alaska is not the proper Federal Court to entertain the matter. That question is subject to review by this court as is shown by the case of *United States v. Larkin*, 208 U. S. 333; 52 L. Ed. 517, and is in fact the sole question for determination on this appeal.

ASSIGNMENT OF ERRORS.

I.

The Court erred in entering an order herein on July 29, 1915, refusing to exercise jurisdiction in the premises and dismissing the petition of libelant and petitioner for limitation of his liability, on the ground that the District Court for the District of Alaska, Division No. One, at Juneau, was without jurisdiction to entertain said petition.

II.

The Court erred in sustaining the oral objections of the claimant, C. A. Holmes, entering an order dismissing the petition and refusing to examine the matter on the merits. (Ap. 12).

ARGUMENT.

The determination of this question must largely depend upon the construction of Admiralty Rule 57. The trial judge rested his opinion entirely upon a dictum construing that rule. (Ap. 9). For these reasons it is proper to note its history and purpose. In one of the earliest decisions concerning the Limitation Acts, the Supreme Court said:

“The Act does not state what Court shall be resorted to, nor what proceedings shall be taken; * * * For aiding parties in this behalf and facilitating proceedings in the District Court we have prepared some rules which will be announced at an early day.”

Norwich & N. Y. Trans. Co. v. Wright, 80 U. S. 104; 20 L. Ed. 585.

These rules were announced at a subsequent day of the same term and may be found in 13 Wall, 12, and 20 L. Ed. 926. Referring to them subsequently the Court said:

“In promulgating the rules referred to, this Court expressed its deliberate judgment as to the proper mode of proceeding on the part of ship owners for the purpose of having their rights under the Act declared and settled by the definite decree of a competent court, which should be binding upon all persons interested and protect the ship owner from being harassed by litigation in other tribunals. Unless some proceedings of this kind were adopted, which should bring all parties interested into one

litigation, and all the claimants into concourse for a pro rata distribution of the common fund, it is manifest that in most cases the benefits of the act could never be realized."

Prov. and N. Y. S. S. Co. v. Hill Mfg. Co.,
109 U. S. 578; 27 L. Ed. 1044.

The rules then, were adopted for the purpose of facilitating proceedings and the end sought was to as far as possible "bring all the parties interested into one litigation."

Rule 57 has been materially supplemented since Judge Blodgett announced the dictum which was made the basis of the lower court's decision. The portion which Judge Blodgett referred to is still, however, a part of the rule. It reads as follows:

"The said libel or petition shall be filed, and the said proceeding had in any District Court of the United States in which said ship or vessel may be libeled to answer for any embezzlement, loss, destruction, damage, or injury; or if such ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf."

130 U. S. 705; 32 L. Ed. 1085.

The contention was made before Judge Blodgett that the above language precluded an owner from filing a petition at all until a suit had been commenced either against his vessel or himself. In refuting that he used the words quoted by the lower court in his opinion. (Ap. 9). His expression was as follows:

“But the Court only intended to say that if the owner delayed such proceedings until a suit had been commenced, then he should commence such proceedings in the District Court where suit was commenced.”

The Alpena, 8 Fed. 285.

Bearing in mind the language of the rule as well as its known purpose, this dictum is not justifiable if taken as literally as the lower court appears to have taken it. The rule says nothing about the “commencement” of a suit. It merely says “in the District Court in which the said owner or owners may be sued in that behalf” and the court in making the rule clearly meant that the petitioner should file his petition in the District in which a claim was at that time being pressed. The purpose being to bring claim and petition in as close conjunctivity as possible.

In this case as the petition shows the owner resided in Alaska, and it was there that the appellee’s claim arose. He prosecuted it in the Courts of the State of Washington, then came to Alaska and sued the appellant in his own jurisdiction, suing, however, on the Washington judgment. The appellant filed his petition in the District Court where he was sued. The claim was not only being pressed in the same District, but before the same District Court. The spirit of the rule has been entirely complied with. It would not have been

had the appellant filed his petition in Washington, when the proceedings he prayed to have enjoined were being carried on in Alaska.

The spirit of the rule certainly did not require Mr. Strong to leave his own jurisdiction and go a thousand miles to the State of Washington in order to secure relief against a proceedings being pressed against himself in the District Court of his residence for it was those proceedings against which he sought relief.

Nor did the letter of the law require it. In fact in filing his petition in the Alaska Court the appellant complied with the strict letter of the law. The rule says that the owner may file his petition:

“in the District Court for any district in which the said owner or owners may be sued in that behalf.”

That is, he may file his suit in any District Court in which he is sued by a claimant on behalf of loss or damage. Was not the petitioner being sued by the claimant in behalf of loss or damage in the District Court of Alaska when he filed his petition? It is technically claimed that that suit was not in behalf of claimants loss or damage, but in behalf of the Washington judgment and that the owner was sued in behalf of the loss and damage only in Washington, and accordingly he could file his petition in no other Court than a District Court sitting in Washington. From this line of reasoning it

would follow that the appellant could not limit his liability at all for no court could enjoin the collection of the Alaska judgment unless it was a claim against the owner in behalf of loss or damage suffered. In other words if the suit of *C. A. Holmes v. H. C. Strong*, No. 1130 A, in the District Court of Alaska is not in behalf of loss or damage received on appellant's vessel, no court could interfere with it at the petition of the owner H. C. Strong seeking to limit his liability for said loss or damage. If this is not a claim on behalf of loss or damage how could it be limited at all?

We see no reason in any event why Court Rules should receive a stricter construction than the law the operation of which they were designed to facilitate. The Supreme Court said of the law itself in one of its earlier decisions:

“Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness with the view of giving the shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations, as before stated will be of the last importance, but if it is administered with the tight and grudging hand construing every clause most unfavorably against the shipowner and allowing as little as possible to operate in his favor the law will hardly be worth the trouble of its enactment.”

Prov. and N. Y. S. S. Co. v. Hill Mfg. Co.,
109 U. S. 578; 25 L. Ed. at 1042.

Quoted with approval in 210 U. S. 121; 52
L. Ed. 986.

In the administration of the law itself it has never been held that the claim merges in a judgment. A judgment on a claim is itself a claim in behalf of loss or damage, as is well established by the following authorities:

“Under the American practice he (the owner) may contest his liability for any damages at all, fight that through all courts, and if defeated take advantage of the statute.”

Hughes on Admiralty, Sec. 172.

“There seems to be no limit of time the expiration of which will cut off the owner of the vessel from taking advantage of the provisions of the statute. * * * He may wait until he is sued and defend the case and appeal from an adverse verdict, and after affirmance by the appellate court, still file his libel for limitation of his liability.”

Benedict's Admiralty (4th Ed.), Sec. 520.

See also:

The Benefactor, 103 U. S. 244; 26 L. Ed. 351.

Mon. Rv. Consol. Coal & Coke Co. v. Hurst,
200 F. 711.

The Washington judgment was therefore subject to limitation. Accordingly it must be considered

as a claim on behalf of loss or damage. The suit in the District Court of Alaska No. 1130 A was therefore a suit in behalf of loss or damage and in filing his petition in the same District Court the appellant complied with Rule 57.

We submit that both with the spirit and letter of the Rule the appellant properly filed his petition in the District Court of the District in which he lived in which the loss occurred and in which he was sued in behalf thereof.

We therefore respectfully pray that the order of the lower court be reversed.

J. S. ROBINSON,
H. B. JONES.
IRA BRONSON,

United States Circuit Court
of Appeals
for the Ninth Circuit.

H. C. STRONG,

Appellant,

vs.

C. A. HOLMES,

Appellee.

No. 2648.

IN THE MATTER OF THE PETITION OF H. C.
STRONG TO LIMIT HIS LIABILITY FOR
CERTAIN CLAIMS MADE AGAINST HIM
AS OWNER OF THE STEAMSHIP "ALKI."

Brief of Appellee.

CHAUNCEY L. BAXTER.

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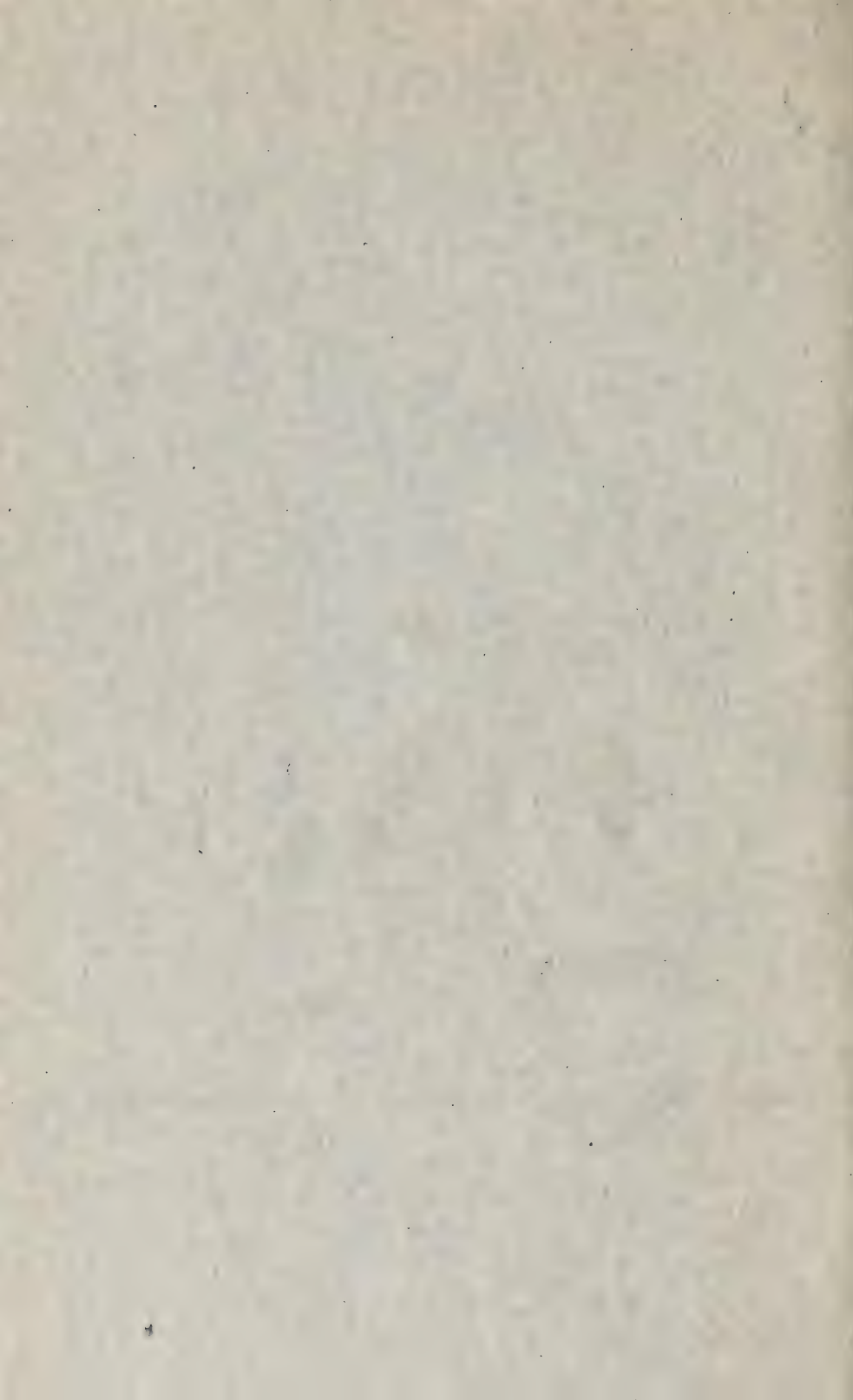
Attorneys for Appellee.

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Brief of Appellee.

The above entitled cause comes before this Court upon appeal from the District Court of Alaska. Appellant's petition for limitation of liability was dismissed on the ground that the proceedings should have been brought in the United States

District Court for the District of Washington, Western Division, that being the proper forum.

JURISDICTION—The petition for limitation of liability must be filed in the District Court for the district in which the vessel is already in custody in those cases where the vessel has already been libelled and where owner has not been sued. In those cases *where the vessel has not been libelled, but where the owner has been sued*, the petition should be filed either in the district in which the owner has been sued, or in the district in which the vessel may be at the time of instituting proceedings. This is in accordance with the Supreme Court Rule No. 57 (130 U. S. 705). The latter part of this rule specifically designates the district in which an owner, who has not been sued, must file his petition, that is, the district in which the vessel may be. In those instances in which the owner has been sued he must file his petition in that district, or, in the district in which the vessel may be.

“The ship owner has a right to await a suit against him and to set up the statutory limitations of his liability as a defense to any recovery if his vessel and freight are lost, or as a partial defense if the claim exceeds the value of his vessel and her

pending freight at the close of the voyage on which the claim arose. If sued in a state Court, he may set up the statutory limitations of liability as a defense or a partial defense in that Court." *Benedict's Admiralty*, Sec. 524.

The defendant in a suit of this nature may await the termination of suit in said Court and then institute proceedings in admiralty, but if he elects so to do, he should be required to bring his admiralty suit in the same jurisdiction. It would seem a travesty on justice that after termination of the suit in a State Court, the defendant would be permitted to go off to a foreign jurisdiction and there institute proceedings in admiralty to limit his liability. The original judgment in this case was obtained in a suit brought against appellant in the state Courts of Washington. In that action both State and Federal Courts of that State then had concurrent jurisdiction. *Berton vs. Tietjen Drydock Co.*, 219 Federal 764. Where Federal and State Courts have concurrent jurisdiction, the one first acquiring jurisdiction will be permitted to retain it.

"If the owner of a vessel is sued in a State Court for a liability alleged to have resulted from his negligence in the operation of a vessel, he should be permitted to show the value of such vessel and his

respective ownership therein, and the jury should be instructed to find the value of the vessel to the end that the owner should be held answerable to the extent of the value of his interest therein." *Loughlin vs. McCaullat*, 65 Am. St. Rep. 872.

If any such proceedings are begun after the suit is brought, they must be in the same district court as that in which the suit is pending.—*The Alpena*, 8 Federal 285. *The Luckenbach*, 26 Federal 870. *Benedict's Admiralty* (4th Ed.), Sec. 529.

In the Matter of the Phoenix Insurance Co., Petitioner, 118 U. S. 624—30 L. Ed. 280. "What is the 'proper district court' referred to in Rule 54 and contemplated by Rule 56? It is the Court, and only Court, mentioned in Rule 57; namely, the District Court in which the vessel is libelled; or, if she is not libelled, then the District Court for any district in which the owner 'may be sued in that behalf.' There is nothing in these rules which sanctions the taking of jurisdiction by a District Court on a petition under the rules, where that Court could not have had original cognizance in admiralty of a suit *in rem* or *in personam* to recover for the loss or damage involved."

The petition herein fails to state the value of the Steamship "Alki" and of her freight then pending. It must be conceded, however, that the value of the ship was and is many times in excess of the amount of the judgment obtained by Holmes. In

the case of *Shipowners & Merchants Transportation Co. vs. Hammond Lumber Co.*, 218 Fed. 162, the Court says, "Where there is but a single claim against the vessel owner, for which a limitation of liability is sought upon which an action has been brought to recover judgment in the State Court, and the value of the vessel involved largely exceeds the amount of such claim, the proceeding should be dismissed. The object of the acts of Congress for limitation of liability apply only to cases where liability may be limited. Except for that particular purpose it clearly was not the intention of Congress to oust the jurisdiction of other Courts."

In the "*Defender*", 201 Federal 191, "The proceeding is intended for the purpose of limiting the liability, and this presupposes that the liability to be limited might exceed the limit; that is, that there might be personal liability beyond that of the *res* involved."

The "*Dauntless*", 212 Fed. 455, "Where, in a proceeding for limitation of liability, it appears that there is but a single damage claimant, which is plaintiff in a pending suit against the petitioner in a State Court in which the amount claimed is much less than the appraised value of the vessel offered to be surrendered, the Court may properly dismiss the proceedings as to such claimant and dissolve the order restraining and presenting its action at law." See also the *Defender*, 214 Fed. 316.

"Where there is and can be only a single claimant against a single owner, and when the appraised value of the vessel exceeds many times the sum al-

ready adjudged to be due claimant, the Court may decline to entertain jurisdiction." *Delaware River Ferry Co. vs. Amos*, 179 Fed. 756.

The "*Enterprise*", 196 Fed. 404, "Where suits for damages have been brought against the owner of a vessel in a District Court of the United States, the respondent has submitted to the jurisdiction of the Court and suits have been heard and determined and appeals from the decrees have been taken by the respondent, a District Court of another district is without jurisdiction to entertain a proceeding by such respondent to limit his liability as against the claim so in suit." In conclusion the Court says, "It is alleged in the petition that suit has been brought by the administrator of a decedent arising out of the same accident in the County Court of the City of Memphis, and that still another suit may be brought. This only adds to the reasons for not interfering. All the parties alleged to have been injured are within the jurisdiction of the District Court for the Western District of Tennessee. A complete concourse of all the people having claims can thus be brought within that district. To commence the limited liability proceeding here, hundreds of miles away from the place of accident, would mean to bring the unfortunate people with all their witnesses here at an expense to them which might prevent their coming and be a denial of justice, for the reason that the vessel, after the accident, came away and has chosen not to again return to the jurisdiction where the accident happened. We do not think the rules are ironclad or are intended to do such manifest injustice; but we do believe that they are intended to accomplish just what the Chief Justice said in *Ex Parte Slayton*, 105 U. S. 451, 26

L. Ed. 1066. For the above reasons, we are of the opinion that this Court does not have jurisdiction of the petition for limited liability, but that petitioners must go to the District Court for the Western Division of the Western District of Tennessee to institute their proceedings." "The petitioner might have applied to limit its liability as soon as the claim in question arose, and thus have brought all the issues into the District Court. It did not choose to do so, and left some issue to be decided in the common law Court. It is bound here upon the decision of such issue." *In re Old Dominion S. S. Co.*, 115 Fed. 845; *The Captain Jack*, 169 Fed. 455.

It is the writer's opinion that the petition in the present proceedings should have been filed in the District Court of the United States for the Western District of Washington, first division, and not in the District Court of the District of Alaska, Division No. 1, at Juneau. Quoting from *Benedict's Admiralty*, Sec. 530, Page 539, after analyzing Rule 57, the text is as follows: "The words in Rule 57 that the petition may be filed in 'the District Court for any district in which the said owner or owners may be sued in that behalf' are broad enough to include any district in which it is possible to bring suit against the owner, *i. e.*, any district in which he may be personally served, or compelled to appear by attachment, and hence that the owner might file the libel in any district in which he is personally present, or in any district in which he has property which might be attached. *But the latter part of the rule procludes such meaning.* Since it specifically

provides the district in which an owner who has not been sued must file his petition, *i. e.*, the district where the vessel may be, and the construction of the whole rule seems to require that the words 'may be sued' in the rule are equivalent to the words 'may have been sued.' "

For a full discussion of the right to maintain a proceeding for the limitation of liability where there is but one claim, and an extensive review of the authorities, see *The Huffmans*, 171 Fed. 455, and the recent case of *White vs. Island Transportation Co.*, 233 U. S., page 346, 56 L. Ed. 993. It being the settled law that proceedings to limit liability may be maintained where there is but one claim, still in that class of cases, where suit has been instituted in the State Court, and defendant has appeared and answered, if he would avail himself of the statute he should be required to do so in that action, so that the question of liability, limitation of liability, and ownership may all be tried out in that action. Were it otherwise, and a second trial could be had between the same parties, involving the same matter, it would be a second trial on the merits, between the same parties, which is not contemplated by the statute and is *res judicata*. *Gleason vs. Duffy*, 116 Fed. 298. "The object of the acts of Congress

for limitation of liability apply only to cases where liability may be limited. Except for that particular purpose it clearly was not the intention of Congress to oust the jurisdiction of other Courts," *Shipowners & Merchants T. Co. vs. Hammond Lumber Co.*, 218 Fed. 164.

"FREIGHT THEN PENDING" — By the terms "Freight pending" and "Freight for the voyage" as used in Sec. 428, Rev. Stat., is meant the earnings of the voyage, whether for the carriage of passengers or merchandise, or where passengers or freight money is prepaid under contracts upon which they become the absolute property of the ship owner, whether the passage is completed or not, it must be regarded as earned, and must be surrendered by the owner to entitle him to a limitation of liability under the statute for claims growing out of such loss. *La Bourgoyne*, 139 Fed. 433. Affirmed, 1908, 210 U. S. 95, 52 L. Ed. 973.

It will be conceded that the value of the ship "Alki" is and was many times greater than the amount of claimant's judgment. Appellant now seeks to escape payment of the judgment by proceedings in this Court to limit liability, setting forth in his petition that his interest in the Steamship "Alki"

was *merely nominal*. No mention whatever is made of "her freight pending" for which he is also liable. All the allegations of the petition are vague and indefinite, and, construed in the most favorable light, are not sufficient to warrant the Court in issuing its mandate herein.

The following is the MEMORANDUM DECISION, filed by Judge Jennings, in this case and has not been included in the Printed Apostles on appeal prepared by appellant. I think the memorandum decision of Judge Jennings should properly come before this Court for its information, and therefore incorporate the same in my brief:

In the Matter of the Petition of H. C. Strong to Limit his Liability for Certain Claims made against him as owner of the Steamship "Alki."

No. 1214-A

In Admiralty.

MEMORANDUM
DECISION

On the 25th day of January, 1915, the petition of H. C. Strong in the above entitled matter was filed in this Court.

While a proceeding to limit liability is in the first place usually *ex parte*, yet as the Court had doubt as to its jurisdiction the Court deemed it to be in the interest of justice that the said C. A. Holmes should have notice of the application and accordingly entered the following order:

“The Court being in doubt both as to its jurisdiction in the premises and as to the sufficiency of the allegations and the propriety of granting the relief asked for, and it being unwilling to decide said questions except upon a full presentation of the matter and an opportunity given to the claimant mentioned in said petition to-wit: C. A. Holmes, does now adjourn the hearing of the matters contained in the petition until Monday, the first day of March, 1915, at 10 o'clock A. M., and does direct that notice be given, by the petitioner, to the said C. A. Holmes, or to his attorney in the action of *C. A. Holmes vs. H. C. Strong* (Being No. 1130-A of the files of this Court), that on said date and at the Court House in Juneau, the said petition will be brought on for argument, both as to the jurisdiction of the Court, the sufficiency of the allegations of the petition, and the propriety of granting the relief asked for, at which said time and place he, the said C. A. Holmes, or his attorney, may appear and present such argument and authorities in opposition to the prayer of said petitioner as to him may seem desirable. A copy of said petition shall be served with said notice.”

(This was in consonance with the course taken in *The Enterprise*, 196 Fed. 406.)

The claimant Holmes duly appeared and filed a brief in which the following questions were raised:

(1) Jurisdiction of the Court—The claim is made, first, that the petition is not filed in the proper Court; second, that the petition does not state any facts sufficient. We will notice the question of jurisdiction or non-jurisdiction.

In what Court should such a petition be filed?

The 57th Admiralty rule of the Supreme Court is as follows:

“The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which the said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which ~~the~~ said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship has already been libelled and sold, the pro-

ceeds shall represent the same for the purposes of these rules."

(130 U. S. 705.)

It is not alleged in the petition that the vessel has been libelled at all, and so the inquiry arises, what is meant by the words "in which the owner may be sued in that behalf"?

It seems to me that those words do not mean and cannot mean "in which it is possible for the owner to be sued in that behalf," because it is possible to sue the owner wherever personal service can be had on him; and to say that the words mean that, would be to say that if a casualty occur on a vessel in Florida, the owner may go to the State of Washington and file a petition to limit his liability, although neither the vessel nor its proceeds is in Washington, and altogether neither the owner nor the claimant lives there. Such a construction it seems to me would be absurd. When we reflect ~~that an occurrence such as the one out of which~~ these proceedings arose gives a cause of action against both ship and ship owner, it would seem ~~that an occurrence such as the one out of which~~ that this rule is simply providing for both kinds of action. It uses the very same words, *i. e.*, "may

be", when it talks about libelling a ship, and yet manifestly it means "may have been libelled."

The rule says, "the District Court of the United States in which the said ship or vessel may be libelled," but that that means "may have been libelled" is indicated by the use of the following alternative, viz: "Or if such ship or vessel be not libelled, then in the District Court for any district in which said owner or owners may be sued in that behalf"; that is to say, "the ship may not have been libelled but the owners may have been sued in that behalf," and in such a case as that the proceeding should be in that district in which the owner has been sued in that behalf.

The Enterprise, 196 Fed. 410.

"*In that behalf*" refers to what has gone before in the rule, to-wit: "To answer for any such embezzlement, loss, destruction, damage or injury."

The rule, therefore, is as if it read, "the District Court of the United States in which the ship or vessel has been libeled or if such ship or vessel has not been libeled, then in the District Court for any district in which said owner or owners has been

sued to answer for any such embezzlement, loss, destruction, damage or injury."

THE PETITION.

As there is no allegation that the vessel has been libeled, the next question to be considered is:

Where, if anywhere, has the owner been sued "in that behalf," that is, where, if anywhere, has he been sued "to answer for any such embezzlement, loss, destruction, damage or injury"? If he has been so sued in this Court, then the proceedings for limitation of liability may be instituted in this Court.

The allegation is that said Holmes "has, in the Superior Court of King County, State of Washington, secured a judgment on said claim, and in the further prosecution of said claim has secured a judgment in this Court, sitting at Juneau, Alaska."

If the judgment which has been recovered in this Court was recovered in a suit brought on the judgment in the Washington Court it cannot be said to be a suit *in further prosecution of the claim*—on the contrary, it would have been a suit on a contract. The reason of this is that when the judg-

ment was recovered in the Washington Court it merged or extinguished the cause of action—the relations between the parties were no longer affected by the tort sued on in the Washington Court—the relations were changed by the judgment, for the judgment would be considered as a new debt and this new debt is not affected by the character of the old one; although the original tort may have given rise to the Washington judgment, yet that judgment is a contract and hence may be the foundation of an action of debt or of an offset under the statute permitting matters *ex contractu* to be set off (1 *Freeman on Judgments*, 3rd Ed., Sec. 217, 220; 23 *Cyc.*, p. 1549, e.); consequently a suit hereon the judgment there would not be a suit “*in that behalf.*”

Such being the case, this Court would have no jurisdiction, because the petition should not have been brought in the jurisdiction “where the vessel had been libelled or where the owner had been sued “*in that behalf.*”

On the other hand, if the judgment referred to as having been rendered in this Court, was not rendered in a suit brought upon the judgment of

the Washington Court but was rendered in a suit on the tort in question, then this might be the proper jurisdiction for the limitation proceeding, because, in such event (no libel having been filed), the proceedings would have been brought in a court where the petitioner had been sued "*in that behalf.*"

Now, there is nothing in the allegation of the petition which would warrant the Court in saying that the judgment alleged to have been recovered in this Court is a judgment brought upon the judgment alleged to have been recovered in the Washington Court. Counsel for the claimant (that is, Holmes), in his argument has made the statement that the judgment of this Court in the case referred to in the petition was in fact a judgment rendered in a suit brought upon the Washington judgment, and he asks the Court to take notice of its own records. The Court cannot do that however, because the judgment referred to was rendered in a case other than the case now before the Court, and the Court does not notice the records of other cases, even though they be in its files.

16 *Cyc.*, p. 918, d.

And yet if the said statement of counsel is

true, then, in the opinion of this Court, this action has been brought in the wrong Court and it would be a waste of time and money, and might result in an unwarranted loss to the claimant to allow petitioner to proceed any further in the matter.

In order to test the jurisdiction of the Court in the first instance, therefore, the claimant will be permitted to file an answer to this petition, in which he may set forth the fact, if it be a fact, that no suit has been brought in this jurisdiction on any claim set forth in the petition: If such answer be filed, there will then be before the Court an issue of fact, upon the determination of which the question of jurisdiction depends. The Court will then try and decide that issue before considering any further steps.

ROBERT W. JENNINGS,

Judge.

In conclusion we wish to say that we have read carefully appellant's brief in support of his appeal herein, and have examined authorities cited, and as stated therein, the determination of the question rests largely upon the interpretation to be given to

Rule 57. The original rule was promulgated by the Supreme Court many years ago. It was amended in 1885 by incorporating into the rule a certain provision to the effect that in cases where ship *had not been libelled* and suit *had not been commenced*, the proceedings to limit liability might be had in the district where the ship *may be*—that is, in the district where the ship was at the time of the filing of the petition. The rule contemplates that proceedings must be instituted “where it (the ship) may be subject to the control of the Court for the purposes of the case.” The amendment is a sentence incorporated into the body of the original rule, not changing the first or last part of it. It simply enlarges the rule; does not curtail or change any of its provisions as originally adopted by the Supreme Court. One of the provisions of the rule before and after the adoption of the amendment is to the effect that in all cases where a ship has not been libelled, but the owner has been sued, the petition must be filed in the district where the owner may be sued in that behalf. This clause referred to seems plain and unambiguous. It stands alone and is not affected by the amendments. Judge Blodgett construed it

to mean just what it said, and so expressed the law to be in *The Alpena*. Judge Jennings is clear in his reasoning and follows Judge Blodgett in holding that both proceedings should be in same district.

In the case of *Norwich & N. Y. Trans. Co. vs. Wright*, cited by appellant, that Court was dealing with a case somewhat similar to the one hereunder consideration. In that case a ship was libelled in the Eastern District of New York in an action for damages, *in personam*, wherein judgment was duly recovered. Proceedings to limit liability were thereupon brought in the district of Connecticut. In passing upon the question of jurisdiction in limitation of liability proceedings, the Court says: "The difficulty with the respondents in this case is that they have not taken proper steps, in the proper Courts, to enable them to avail themselves of the benefits of the act. That want of any uniform practices on the subject may, perhaps, be sufficient cause for not having done this. If proceedings are still pending in the Eastern District of New York, it is not yet too late to initiate proper proceedings there for making an apportionment in the case."

In another place the Court says, "If an action

should be brought in the State Court the ship owner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the State Court or procure an order from the District Court to restrain further prosecution of the suit. The Court having jurisdiction of the case, under and by virtue of the Acts of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties."

In the case of *Prov. & N. Y. S. S. Co. vs. Hill Mfg. Co.*, cited by appellant, in passing upon the question of jurisdiction where proceedings to limit liability have been commenced, and as to where would be the proper place to institute such proceedings, the Court says: "When cases arise in which the vessel and freight have been totally lost, and no District Court has or can have possession of any funds to distribute, resort may probably be had with propriety to the District Court of the district in which the owners reside, or where the vessel perished. It will be time enough, however, to consider what is proper in such exceptional cases when they arise." In another place the Court says, "In the

present case, the proper Court undoubtedly was the District Court of the United States for the Southern District of New York, where the remains of the vessel were situated and where suits were brought against the owners."

Viewing the present case from its many different angles, and considering the spirit and intent of Congress in enacting the law, and of the Supreme Court in promulgating the rule, and after reading the numerous authorities cited in our brief, we cannot help but feel that the decision of Judge Jennings is right and equitable and should be sustained.

We therefore respectfully pray that the order of the lower Court be sustained.

CHAUNCEY L. BAXTER.

J. WILL JONES.

V. A. PAINE.

